advantage existed at the time of adjudication, although it was not shown. What may be said with certainty about the *Cellophane* case, however, is that there was no diversion from the *Alcoa* case, and if there were any changes from other prior cases on the question of market definition it was in form and not in substance.

REGULATORY "EXECUTIVE PRIVILEGE" TO WITHHOLD INFORMATION

That the maintenance of secrecy in regard to certain types of information in the possession of the federal government is desirable needs no explanation. The executive branch having been entrusted with the responsibility of carrying on the affairs of the nation, it is natural that the appropriate departments, in their discretion, classify information collected by them in the exercise of these functions. On the other hand, it is a fundamental requirement in the Anglo-American system of administration of justice that any evidence which may aid in the assessment of the rights of the parties to a law suit be made available,[1] if need be under judicial compulsion. Obviously, where the two requirements conflict, i.e. when data possessed by the executive branch and considered by it not susceptible of disclosure becomes needed as evidence in court proceedings, a decision must be reached which subordinates one of the two requirements to the other. This adjustment is made within the framework of the law of evidentiary privileges from disclosure. When the need for secrecy is determined to be paramount, the court will accord immunity from disclosure to the information in the form of a "governmental privilege."[2]

1. *Ex parte* Uppercu, 239 U.S. 435 (1915).

2. The two common law governmental privileges universally recognized are the state secrets privilege and the informer privilege. The former is said to apply where it is attempted to obtain production of information the disclosure of which would tend to injure the national security or cause diplomatic embarrassment. The latter is applicable to prevent disclosure of the identity of informers who are the government's sources of information concerning illegal acts committed. The policy behind this privilege is founded on a fear that communications of this type will in the future be made less freely, or not at all, if the precedent of disclosing the communicant's identity in court proceedings were to be established, such communications being essential to the efficient administration of government.

One distinction, besides that inherent in the policy reasons, between the two privileges is found in the fact that in the case of the informer privilege the privilege is one which attaches to a *type* of information, the privilege being granted (unless special reasons exist for not granting it) as soon as it is established that the information sought to be produced is of that type, i.e. is the identity of an informer, whereas a state secrets privilege is founded on characteristics inherent in the *particular data* sought to be pro-

Ideally, the decision as to whether such a privilege applies would be made on the basis of an impartial weighing of the interests favoring secrecy against those favoring disclosure.[3] Such weighing of interests traditionally is a judicial function; where a similar problem arises with respect to disclosure of papers possessed by a private person, the court may order the documents produced and in its own discretion through examination of the documents determine the applicability of a privilege. However, because of the position of the executive branch as a co-ordinate organ of government, such an order to an executive officer may raise problems. In behalf of the executive branch it has been argued that the determination of the advisability of disclosure rightfully belongs with the agency which is responsible for the activity to which the desired information relates.[4] Nevertheless, the weight of American legal opinion

---

duced. This distinction is particularly important with respect to the question of who is to decide whether a privilege applies in a particular fact situation. From this distinction it follows that the question of informer privileges may be determined by the court without viewing the papers involved, except, perhaps, to determine whether the information falls within the class (informers' identity) to which the privilege is accorded; but this is usually not disputed by the party seeking the information. (A different problem is presented where disclosure of informers' identity is feared incidental to the production of other information. The court may here order production for its examination. United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952)).

On the other hand, where a request for production of information in the possession of the executive branch is met with a claim of state secrets by the executive officer involved, the court, in order to decide applicability of this privilege, must insist on examining the particular data involved unless satisfied on the basis of other evidence that the claim is justified.

3. The interests to be considered have been described as a public interest (in nondisclosure) versus a private interest (in disclosure); however, the better view seems to be that both are public interests—as the public has an interest in the just settlement of litigation as well as in the preservation of secrecy for certain types of information held by the government. 8 WIGMORE, EVIDENCE, § 2378 a(C)2 (3d ed. 1940); Note, 58 L.Q. REV. 436, 437 (1942). If the distinction between private and public interests in this matter is maintained, this will tend to predetermine the outcome in favor of nondisclosure, as public interests to many people would seem to be inherently superior; the distinction, then, will tend to obscure the basic factors to be considered: the relative advantage of keeping the particular data secret versus the disadvantage of depriving the litigant of the evidence. See Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments,* 3 VAND. L. REV. 73, 89 (1949).

4. See 47 NW. U.L. REV. 519, 528-30 (1952).

The leading English case stresses this point of view, as the following quotation shows: "'Those who are responsible for the national security must be the sole judges of what the national security requires.'" Duncan v. Cammell, Laird, & Co., [1942] App. Cas. 624, 641, quoting *The Samora,* [1916] 2 A.C. 77, 107.

Professor Wigmore has pointed to the dangers of bureaucratic abuse inherent in a rule of executive determination. 8 WIGMORE, EVIDENCE, § 2378a (3d ed. 1940). The accuracy of his description of the administrative handling of the problem of disclosure is doubted by the author of the Note, 47 NW. U.L. REV. 519, 528 & n.46 (1952).

The English experience under the Duncan rule has partially substantiated the fears of Professor Wigmore. See Note, 69 L.Q. REV. 449 (1953); Street, *"Recent Cases in Administrative Law,"* Journal of the Royal Institute of Public Administration, XXXIV (Summer, 1956), 215. The claim of paramount public interest has been much abused in cases involving disclosure of information in the control of the executive. For ex-

is that this area is a proper one for judicial review.[5]

The rule of judicial determination in the application of evidentiary privileges to government-held information has been hampered by the development and growth in this century of the phenomena known as "regulatory privileges" from disclosure, i.e. court-sustained regulations or similar instructions promulgated by the respective department heads which prohibit disclosure by subordinate officers of specified types of information in the control of the department. Although not in theory establishing an evidentiary privilege but merely purporting to take away the authority to disclose information of the type covered by the regulation from inferior officers and "centralize" this authority in the department head, the practical result of these regulations is often indistinguishable from the extension of an evidentiary privilege to the information involved. This doctrine of regulatory "privilege" is, as currently applied, an unjustified extension of the rule as it was first laid down, the results being undesirable because it forces the courts to abandon control over the evidence in question or resort to inadequate substitutes, depending on the type of litigation in which the question arises.

---

ample, the Treasury Department has refused to produce the records desired by the plaintiff (relating to plaintiff's contract with the government) on the ground that they "contained matters of strictly privileged nature, some of them relating to other contracts for the construction of the building in question, such as should not for the public interests be spread upon the records." Robinson v. United States, 50 Ct. Cl. 159, 163 (1915). Apparently, the government intended to offer the same records in evidence at a time more opportune for the defense; so the claim obviously was not based on a felt need for secrecy. See also Brewer v. Hassett, 2 F.R.D. 222 (D. Mass. 1942).

In King v. United States, 112 Fed. 988 (5th Cir. 1902), the district attorney contended that a prosecution witness could not be allowed to answer questions as to "conversations of government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses" because such questions were "directed towards the ascertainment of a state secret, which is privileged on grounds of public policy." The court, however, did not think that such conversations rose "to the dignity of state secrets."

In Ellis v. Home Office, [1953] 2 Q.B. 18 (C.A.), the government claimed privilege for reports by officers of the prison hospital to which the plaintiff had been committed awaiting trial when the injuries for which he sought relief were inflicted upon him by another prison inmate. The plaintiff alleged that the records would show that the hospital officials responsible for his welfare had had reason to know that the attacker was of a dangerous disposition. The reason given by the government for its refusal to produce the records was that disclosure would be injurious to the public interest. Following the *Duncan* rule, the court had to grant this privilege, in spite of the "uneasy feeling" of the trial judge that justice was not done.

5. The United States Supreme Court has said that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." United States v. Reynolds, 345 U.S. 1, 9-10 (1953). It was Professor Wigmore's opinion, with regard to the state secrets privilege, that "both principle and policy demand that the determination of the privilege shall be for the Court." 8 WIGMORE, EVIDENCE, § 2379 (3d ed. 1940). The following notes espouse similar views: Notes, 36 GEO. L. J. 656, 664 (1948); 41 J. CRIM. L., C. & P.S. 330, 334 (1950); 29 N.Y.U.L. REV. 194, 211-12 (1954); 18 U. CHI. L. REV. 122, 127, (1950).

The regulatory "privilege" originated in a series of cases decided between 1895 and 1910.[6] These cases were occasioned by the enactment

6. The timing of these cases was not fortuitous. The functional expansion of the executive in the last decades of the nineteenth century caused numerous new types of information to be gathered and kept by the executive branch, many of which might become relevant as evidence in litigation. The earlier cases had been concerned mostly with disclosure of an informer's identity or official correspondence, i.e. types of information in regard to which the question of who decides the applicability of a privilege does not usually become crucial. United States v. Moses, 27 Fed. Cas. 5, No. 15825 (C.C.E.D. Pa. 1827) (identity of the informer upon whose information the arresting officer went to the defendant's house and found the defendant in the process of forging bank notes was held privileged from disclosure). Gardner v. Anderson, 9 Fed. Cas. 1158, No. 5220 (C.C.D. Md. 1876) (disclosure not allowed of a letter from the defendant to the United States Secretary of the Treasury, allegedly liberous of the plaintiff, a clerk in the Office of the Appraiser of Merchandise). Vogel v. Gruaz, 110 U.S. 311 (1884) (error to allow disclosure of statements made by the defendant to the state attorney to the effect that he wanted to prosecute the plaintiff).

The English cases, though more numerous, followed the same pattern. The informer privilege: The Trial of Christopher Layer, 16 How St. Tr. 93 (1722) (minutes taken at a pre-trial examination of the defendant were held privileged from disclosure as they referred "to a great many other people, and it would be for the disservice of the king to have these things disclosed." The court said that the Attorney General could have obtained a refusal of the production without any explanation; so here executive determination, apparently was considered appropriate. At 224).

In Rex v. Akers, 6 Esp. 125, 170 Eng. Rep. 850 (N.P. 1790), the defendant was not allowed to inquire of the identity of the person who informed the officer of certain smuggled goods. The defendant had obstructed the search. The Trial of Thomas Hardy, 24 How. St. Tr. 199 (1794) (name of person "of high office" who had employed the witness as a spy to attend seditious meetings was not allowed to be disclosed). The Attorney General v. Briant, 15 M. & W. 169, 153 Eng. Rep. 808 (Ex. 1846) (questions to a witness as to whether he had informed the government that the defendant had violated the excise tax law were not allowed). Regina v. Richardson, 3 F. & F. 693, 176 Eng. Rep. 318 (N.P. 1863) (no privilege allowed for identity of informers where essential to show the defendant's innocence). Marks v. Beyfus, 26 Q.B.D. 494 (C.A. 1890) (disclosure not allowed of names of informers and contents of written statements furnished the Director of Public Prosecutions, allegedly the basis of a prosecution instituted against the plaintiff, who sought the information for use in this action for malicious prosecution).

Official communications: Wyatt v. Gore, Holt 299, 171 Eng. Rep. 250 (N.P. 1816) (communications between the Lieutenant Governor of Upper Canada and his Attorney General, allegedly libelous of the plaintiff, was held privileged from disclosure). Cooke v. Maxwell, 2 Stark. 183, 171 Eng. Rep. 614 (N.P. 1817) (orders given by the Governor of Sierra Leone to a major, commanding him to imprison the plaintiff and destroy the plaintiff's property, could not be produced in court as evidence). Rex v. Watson, 2 Stark. 116, 171 Eng. Rep. 591 (N.P. 1817) (the defendant could not inquire into the identity of the person to whom certain short-hand notes taken by a prosecution witness of an allegedly seditious speech by the defendant had been delivered). Blake v. Pilfold, 1 M. & Rob. 198, 174 Eng. Rep. 67 (N.P. 1832) (the privilege for official communications made in the discharge of public duty was held not to extend to communications from a private person to a public officer, complaining of the conduct of an inferior officer). Smith v. The East India Co., 1 Ph. 50, 41 Eng. Rep. 550 (Ch. 1841) (correspondence between the Court of Directors of the East India Co. and the Commissioners for the Affairs of India, relating to a claim by the plaintiff on the company was held not susceptible of production in court as evidence). Chatterton v. Secretary of State for India, [1895] 2 Q. B. 189 (C.A.) (production was not allowed of a writing from the defendant to the Undersecretary for India, allegedly libelous of the plaintiff).

With the growth of government, privileges appliable to specific pieces of information, because of their particular characteristics, became important for the first time.

of state prohibition and liquor tax laws, which co-existed with federal legislation taxing liquor dealers. In state prosecutions for violation of such state liquor laws, records of payment of the federal tax became sought-after evidence.[7] For example, in *In re Huttman*[8] the petitioner for habeas corpus was a deputy revenue collector who had appeared as a witness under a subpoena duces tecum in a state criminal trial for violation of the state prohibition act. He had refused to produce the records sought disclosed (of the defendant's application for a federal special retail dealer's tax stamp) and on intervention by the federal district attorney this part of the subpoena had been quashed. When he refused to testify as to the contents of the records, however, he had been held in contempt and had been committed accordingly. The federal court granted the writ of habeas corpus and upon the return ordered the prisoner released. The court based its decision on the finding that the petitioner had acted in accordance with regulations, promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, prohibiting disclosure of such information by revenue collectors, which regulations were based upon statutory authority.[9] Furthermore, the court thought that even without such regulations "the officers of the government, in the exercise of their duties in carrying out and enforcing the law of the United States, must not be interfered with by any

---

Totten v. United States, 92 U.S. 105 (1875) is often cited as the first case in which a state secrets privilege was recognized in the United States. Although the question involved in this case was one of a state secret, the decision is best understood on the background of the privileges granted to a class of papers. The court refused the maintenance of a contract action the subject matter of which was a contract between the plaintiff and President Lincoln for espionage during the Civil War, holding that the contents of such a contract were privileged. However, the scope assigned to the privilege by the court in this case most resembles that accorded informers' identity and official communications, i.e. a privilege extended to a *class* of documents which *on principle* should not be disclosed. This is apparent from the fact that the action was dismissed although the contents of the contract had already been disclosed.

It is with these developments in the background that the regulations prohibiting disclosure of governmental information were promulgated. They served to indicate the position of the executive branch to the question of where the decision as to applicability of governmental privileges should be lodged. Conceivably, they were at first intended only for use in state courts.

7. For example, a Vermont statute provided that payment of the federal tax should be prima facie evidence that the taxpayer was a common liquor seller and that his premises were a common nuisance (Vt. Sess. Laws 1888, § 4476), *In re* Weeks, 82 Fed. 729 (D. Vt. 1897).

8. 70 Fed. 699 (D. Kan. 1895).

9. The statute is not cited in the opinion; presumably, it was REV. STAT. § 161 (1875), 5 U.S.C. 22 (1952), which provides: "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." Presumably the regulations in question forbade disclosure by the officer.

other tribunal or any other power."[10]

The statute presumably relied upon in the *Huttman* decision as well as a regulation to the same effect as those involved in that case were cited by the petitioner in *In re Weeks*[11] to justify his refusal to answer similar questions as a witness in a state criminal proceeding for violation of a state liquor law.[12] Here the petitioner was again discharged, the court finding that the regulation was "not contrary to law" (the language of the enabling statute) and that the petitioner, therefore, could not be required to answer. There is also dictum to the effect that the federal government cannot be required to furnish evidence to a state court.

The position taken in this decision was later adopted by the Supreme Court when presented with a similar fact situation in *Boske v. Commingore*.[13] The court, by merely pointing out that there was no statute with which the regulation conflicted, reasoned that the regulation was "not inconsistent with law," as required by the enabling statute;[14] also, the

---

10. 70 Fed. at 702.

11. 82 Fed. 729 (D. Vt. 1897).

12. An intervening decision had reached the opposite result of that reached in *Huttman* on the technical ground that the instructions relied upon by the petitioner in that case did not have the standing of regulations. *In re* Hirsch, 74 Fed. 928 (C.C.D. Conn. 1896).

13. 177 U.S. 459 (1900).

14. REV. STAT. § 161 (1875), 5 U.S.C. 22 (1952). See note 10, supra. The statute through this interpretation becomes the vehicle for the suppression of a wide range of evidence in judicial proceedings. The constitutionality of legislation which withdraws evidence from a court is open to doubt. For example, in *Ex parte* French, 315 Mo. 75, 285 S.W. 513 (1926), provisions by a state statute imposing secrecy on state bank commissioners, officers, and employees of the state bank commission with respect to "all facts and information obtained in the course of all examinations. . . ." were declared unconstitutional, partly on the ground that they interfered with the power of the court to compel production of evidence. The court said: "We may say that the provision of the act which prevents the court in a civil case from procuring evidence, in the conduct of the trial, is an unwarranted interference with the functions of the court. A leading case on this subject is Brown v. Circuit Judge of Kalamazoo County, 75 Mich. 274, 283, 42 N.W. 827, 830, 5 L.R.A. 226, loc. cit. 230 (13 Am. St. Rep. 438) where it is said:

"It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights.

"If a litigant in a civil case is forbidden by statute to obtain evidence, otherwise available, then the power of the court to enforce his rights is impaired and a 'certain remedy' is not 'afforded.'

"This is not an attempt by the Legislature to enact a rule of evidence, nor to define the effect of a certain character of evidence in making out a prima facie case. It is an attempt to say the courts shall not have or use certain evidence, however pertinent or necessary for proper determination of a case. It is an unconstitutional encroachment upon the proper functions of the courts. 10 R.C.L. pp. 863-867." *Ex parte* French, *supra* at 85, 285 S.W. at 515.

The state constitutional provision referred to in the above quotation is the one now found in Mo. CONST. art. I, § 14 (1945): "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial, or delay."

Professor Wigmore was of the opinion that the federal statute was erroneously construed in the cases upholding regulations prohibiting the production of documents in court. 8 WIGMORE, EVIDENCE § 2378a (3d ed. 1940).

records involved were not such as were "at all times open of right to inspection."[15] Therefore, the court said, the regulation must necessarily be "not inconsistent with law."[16] This holding probably was well tailored to fit the particular situation at hand involving the question of enforcement of production in a *state court* of papers within the control of the *federal executive branch.* However, the categorical language in which the regulatory prohibition of production was upheld was to haunt the courts in new cases with different imports. After the *Boske* decision it became common for officers of the federal government, when called upon to produce information in their possession, even in *federal courts,* to decline to do so by referring to regulations promulgated by the respective department heads.[17] These regulations were based upon the statutory authority upheld in the *Boske* decision[18] or upon statutes to the same ef-

15. 177 U.S. at 469.

16. In two later cases state courts attempted to circumvent the above decision, in one case by requiring testimony by a deputy collector of internal revenue as to places where he knew that federal tax stamps had been posted (*In re* Lamberton, 124 Fed. 446 (W.D. Ark. 1903), in another case by requiring a federal storekeeper and gauger, who had been staying at the defendant distillery in his official capacity, to testify as to the production there (Stegall v. Thurman, 175 Fed. 813 (N.D. Ga. 1910). In both cases the federal courts held that such testimony could not be required without violating the policy of the regulation in force in these cases, the petitioners having obtained the information sought in their official capacities.

The question of production in a state court of documents in the possession of a federal governmental agency has arisen infrequently since the *Boske* case. Jacoby v. Delfiner, 51 N.Y.S. 2d 478 (1944), is typical of the modern cases in which the problem has been encountered by a state court: In this case the plaintiff's motion for an order directing the United States Department of Justice to furnish information concerning proceedings pending against the defendant in the Immigration and Naturalization Service was denied. The court refused to make what it considered an attempt to intrude upon the province of the federal authorities and pointed to the fact that the Justice Department would not be bound by such an order, which therefore would be to no avail.

17. In United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951), the Supreme Court upheld the application to federal court proceedings of a regulation (Department of Justice Order No. 3229, 11 FED. REG. 4920 (1939)) prohibiting the production in court, upon subpoena duces tecum, by officers or employees of the Department of Justice of oficial files, documents, records, and information in the departmental offices unless production was directed by the Attorney General. The opinion relies on Boske v. Comingore, 177 U.S. 459 (1900), but presents a more fully reasoned argument for the holding. The theory is that, in view of "the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court," the department head is warranted in reserving for himself the decision as to whether disclosure should be made or privilege claimed.

The holding in the *Boske* decision *supra,* as supplemented by the reasoning in the *Touhy* decision *supra,* is the precedent commonly relied on in the assertion of a privilege based upon regulations of the nature described.

18. For example, Department of Justice Order No. 3229, *supra* note 17. This regulation has been invoked in the following cases, among others: United States *ex rel.* Touhy v. Ragen, *supra* note 17; United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1954); United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952); O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947); United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556 (S.D.N.Y. 1946); United States v. Potts, 57 F. Supp. 204 (M.D.

fect.[19] In the absence of a restrictive interpretation by the Supreme Court, the language of *Boske* was applied literally by the federal courts to comprehend situations where evidence was needed in federal courts;[20]

Pa. 1944); United States v. Schine Chain Theatres, 4 F.R.D. 109 (W.D.N.Y. 1944); United States *ex rel.* Bayarsky v. Brooks, 51 F. Supp. 974 (D. N.J. 1943). A forerunner of this rule, § 65 of the Rules and Regulations of the Divisions of Investigation, United States Department of Justice, of similar import, was cited in the support of privilege in *Ex parte* Sackett, 74 F.2d 922 (9th Cir. 1935).

Unidentified Treasury Department Regulations were invoked in Brewer v. Hassett, 2 F.R.D. 222 (D. Mass. 1942) and in Harwood v. McMurtry, 22 F. Supp. 572 (W.D. Ky. 1938).

Department of Labor regulations: Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953) (Unidentified regulations); Walling v. Comet Carriers, 3 F.R.D. 442 (S.D. N.Y. 1944) (reliance by the government on Article III, sections 1 and 2 of the Regulations of the Department of Labor); Walling v. Richmond Screw Anchor Co., Inc., 4 F.R.D. 265 (E.D. N.Y. 1943) (same regulations relied upon).

Navy Department Regulation 34 C.F.R. 12.15 (requiring authorization by the Secretary of the Navy for producing certain classes of departmental information in civil court) was cited by the government in Bank Line v. United States, 163 F.2d 133 (2d Cir. 1947).

19. For example, 50 U.S.C.A. APPENDIX § 921 (d) (1942), which authorized the Price Administrator to promulgate orders and regulations to carry out the provisions of the Act. The Administrator's General Order No. 55, April 6, 1944 (providing that certain types of information possessed by the Administration could not be disclosed except with the approval of the Administrator) was based on this statutory provision. This regulation was cited by the government in Bowles v. Ackerman, 4 F. R. D. 260 (S.D. N.Y. 1945) as a basis for privilege from disclosure of copies etc. taken by the Price Administration from the defendant's books. Presumably, this was the OPA regulation relied upon also in United States v. Beekman, 155 F.2d 580 (2d Cir. 1946), for a similar purpose.

20. For example, in *Ex parte* Sackett, 74 Fed. 2d 922 (9th Cir. 1935), the petitioner for habeas corpus, committed for refusal to comply with a subpoena duces tecum to produce "copies of correspondence and contracts and other private documents" in the possession of the Federal Bureau of Investigation in a suit to collect an amount (the damages and penalty imposed by the Sherman Anti-Trust Act), was released. The court found that his refusal was made on basis of a rule by the Attorney General which must be sustained under Boske v. Commingore, 177 U.S. 459 (1900).

In Harwood v. McMurtry, 22 Fed. Supp. 572-73 (W.D. Ky. 1938) the court said, with respect to refusal by the trial judge to issue subpoena duces tecum for the production of a communication by the defendant to his superior (in the Treasury Department): "I am of the opinion that, under section 161 of the Revised Statutes, 5 U.S.C.A. § 22, and the regulations issued pursuant thereto, the custody of the records and papers in the Treasury Department is vested exclusively in the Secretary of the Treasury, and without his consent the court is without the power to require the production of the communication involved in this case for use as testimony or to require any officer of the department to produce a copy of it or to testify in regard thereto." (Citing *Boske* and *Sackett*).

Again in United States *ex rel.* Bayarsky v. Brooks, 51 F. Supp. 974 (D. N.J. 1943), a rule directed to a federal district attorney who on the basis of Attorney General Regulation 3229 refused to produce "records kept in his office" desired by the plaintiff to enable him to answer a bill of particulars required by the defendant was discharged: "The position taken by the United States Attorney in refusing to comply must be sustained for the reasons set forth in Ex Parte Sackett [citing]."

In United States v. Potts, 57 F. Supp. 204 (M.D. Pa. 1944), names of witnesses testifying before the grand jury were held privileged from disclosure, in part on the basis of Attorney General Regulation May 22, 1939.

In Walling v. Comet Carriers, Inc., 3 F.R.D. 442 (S.D. N.Y. 1944), "affidavits, statements and transcripts of interviews and interrogatories by employees of the de-

and when the question of *Boske's* applicability to federal court proceedings was finally brought before the Supreme Court in *Touhy v. Ragen,* the court chose to uphold this broad interpretation.[21]

It is regrettable that this course was followed. The opposite result could have been reached without the necessity of overruling *Boske v. Commingore* as that case was clearly distinguishable on its facts as involving not a demand by the co-ordinate judicial branch of the government, but a demand by another government. There is no indication that the court in *Boske* envisaged the application of the regulations in federal court proceedings. The holdings in the lower federal courts in *Boske* as well as in the cases preceding it were obviously motivated by the fact that these cases involved a demand on a federal executive officer by a state court. The basic concern in all of these cases was with the position of federal executive officers called upon to provide federal documents to state courts and, therefore, the effect of those holdings should have been limited to that particular problem.

Nevertheless, under the decision in *Touhy v. Ragen* a department head may now prohibit the disclosure of any information in the control of the department even for use as evidence in proceedings in the federal courts. Practically, a court is precluded from viewing the documents in question and from passing upon the merits of such withholding of information on the basis of a genuine evidentiary privilege. As was earlier pointed out, the regulations usually do not purport to establish an evidentiary privilege at all but merely to "centralize" the authority to allow production in the department head. Hence it may be argued speciously that the court is free to enforce production in order to pass on the merits of the claim of privilege in the light of the fact situation at hand by a subpoena directed to the department head; but it is well known that a court, for understandable reasons both of comity and necessity, hesitates to bring the sanctions of the judicial process to bear on the highest officers of the executive departments. In spite of the numerous cases in which a court order for production has been met by plea of regulations of the nature discussed here, one may search in vain for any record of an effective attempt by a court to review the judgment of the department head in thus withholding information. It is clear that in this state of affairs the doctrine of judicial determination is defeated.

---

fendants" in the possession of the Wages and Hours Division of the Department of Labor were held "privileged' from disclosure on the basis of Article III, sections 1 and 2 of the Regulations of the Department of Labor. *Boske* was relied on for this holding. (In later cases to which the government has been a party the courts have approached the question of regulatory privilege differently, see p. 7, *infra*).

21. 340 U.S. 462 (1951), *supra* note 18.

Under the combined force of the *Touhy* decision and judicial deference to high executive officials, then, a federal court will do nothing to enforce production from the government under its power to subpoena enforced by penalty of commitment for contempt, given it by Rule 45(f) of the Federal Rules of Civil Procedure (with respect to witnesses) and Rule 37(b)(2)(iv) (with respect to litigants) when the government seriously resists a production order by claiming a prohibitory regulation or similar order. The courts' reluctance to force production of evidence held by the government under a "regulatory privilege" by subpoena, with its attendant sanction of contempt and arrest, has led them to seek other measures with which to deal with this situation. The only other provisions of the Rules pertinent are those of Rule 37(b)(2)(i), (ii), and (iii) which provide for dismissal of the action where a moving party refuses to comply with a production order, or, if it is the defendant who refuses compliance with such an order, finding against the defendant on the point to be elucidated by the desired information, as well as other sanctions of a similar nature, stopping short of contempt proceedings to enforce actual production. It must be questioned whether these provisions are adequate to provide justice in situations wherein the court is persuaded that information within the control of the executive department should be made available, at least for the judge's determination of the applicability of an evidentiary privilege.

First it is clear that where the government is not a party to the action, and Rule 37(b)(2) therefore does not apply, the court has no method of enforcing production, not even for its own examination, when its order for production is met with a plea of regulatory prohibition from production. No matter what exigencies demand production, the litigant must continue his case without the benefit of the evidence and without even a judicial decision as to its admissibility.[22] The doctrine of judicial discretion in determining applicability of evidentiary privileges is here completely stifled.

Where the government is party to the action in the capacity of plaintiff or prosecutor the courts have held that the government "waives"

22. Appeal of the United States Securities & Exchange Commission, 226 F.2d 501 (6th Cir. 1955); Universal Airline, Inc., v. Eastern Air Lines, Inc., 188 F.2d 993 (D.C. Cir. 1951); *Ex parte* Sackett, 74 F.2d 922 (9th Cir. 1935); United States *ex rel.* Bayarsky v. Brooks, 51 F. Supp. 974 (D. N.J. 1943); Brewer v. Hasset, 2 F.R.D. 222 (D. Mass. 1942); Harwood v. McMurtry, 22 Fed. Supp. 572 (W.D. Ky. 1938).

Where possible, the statutory "privilege" has been interpreted narrowly even in these situations. For example, where the records sought produced (FBI files) were in the possession of an army general, the court refused to apply the Department of Justice regulation on the ground that it applied only to information in the possession of the Department and only when an officer or employee was asked to produce the records. Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947).

any "privileges" based upon regulations and stands as any other litigant subject to the Federal Rules of Civil Procedure.[23] However, the courts, as earlier indicated, have not taken the ultimate consequence of this position, namely, to issue a subpoena duces tecum under penalty of arrest forcing a federal officer to provide the information sought. Even if done, such a course probably would be untenable under *Boske* and *Touhy* insofar as these decisions assert the right of government officers not to be subject to contempt proceedings for refusal to produce information on the basis of regulatory prohibitions, for it can be plausibly argued that this freedom from the sanction of contempt proceedings should not be dependent upon whether the government is a party to the action or not. The net effect of the so-called waiver doctrine, therefore, is merely that in proceedings in which the government is the moving party, a regulation prohibiting disclosure is *no excuse for non-production,* the court's sanctions, however, being limited to those of Rule 37(2)(b)(i), (ii), and (iii). Therefore, when the government as the moving party refuses to produce information on court order, the action will be dismissed.[24]

It is unfortunate that the courts have thus limited their ability to enforce production in government-sponsored actions of information held by the government. This self-limitation may, in an action wherein the government is a party, result in the dismissal of an action which, had the court compelled production of the information in question from the government, would have resulted in a verdict against the defendant. This would be the result in a situation where the court upon inspection

23. Bank Line v. United States, 163 F.2d 133 (2d Cir. 1947); United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1954); Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953); United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952); Bowles v. Ackerman, 4 F.R.D. 260 (S.D. N.Y. 1945); United States v. Schine Theatres, 4 F.R.D. 109 (W.D. N.Y. 1944); Walling v. Richmond Screw Anchor Co., Inc., 4 F.R.D. 265 (E.D.N.Y. 1943). In Summit Drilling Corp v. Commissioner, 160 F.2d 703 (10th Cir. 1947), the privilege seems to have been sustained, but here, apparently, the plaintiff did not dispute the privilege but, on the contrary, sought to take advantage of it to have testimony disadvantageous to him stricken, so that this holding is not on the privilege but on its procedural consequences.

Similarly in criminal prosecutions: United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556 (S.D. N.Y. 1946).

24. In United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949), an anti-trust suit, the court dismissed the suit for refusal of the government to submit documents and correspondence desired by the defendant to examination by the court for determination of privilege. No regulations were referred to in this decision. The discussion was aimed directly at the power of the Attorney General to determine the question of privilege. The court during the proceedings stated its opinion that to accord to the Attorney General this power would amount to "an abdication of the Court's duty to decide the matter."

would have found insufficient evidentiary value in the document to warrant its disclosure.[25] Also, where the action is brought by one executive agency and the documents sought to be produced are in the possession of another agency, the interests of the prosecuting agency may be given little or no weight in deciding whether disclosure will be made.[26]

Further, the argument may be made that, with respect to the philosophy underlying these provisions of the Federal Rules of Civil Procedure, they are singularly unfit for use against the government. The Rule in question supplements the court's power to commit for contempt, in order to provide a more convenient way, in proper cases, to accomplish a just result. Thus, where a litigant refuses to comply with a court order, he will be made to take the consequences either through suffering committment for contempt or through having his interests in the litigation injured. The latter sanction is justly applied where the party refusing to comply with the court order is identical to the party whose interests are at stake in the litigation. This view justifies the application of the sanction of dismissal in the case of a private litigant; but the premise is not fulfilled where the government is the moving party. The party in interest here, the public, is present only by representation; and

25. The proceedings in the trial court in United States v. Grayson, 166 F.2d 863 (2d Cir. 1948), are illuminating. A subpoena was issued commanding the SEC to produce sales reports in the possession of the Commission. The records were produced; the judge examined them and ordered them excluded for being too remote. Thereupon the trial was carried on to a conviction. Here, if the government had resisted the production seriously, the result, on the authority of United States v. Cotton Valley Operators Committee, *supra* note 24, could have been a dismissal of the action. In this particular instance the appeal did result in the discharge of the defendant but for the reason that the appellate court was of the opinion that the documents were *not* too remote.

26. The question of production by one government official of information in the custody of another government official was touched upon in Grayson v. United States, *supra* note 26. When Grayson desired certain "sales reports" required to be filed with the SEC to be put into evidence, the prosecution objected that they were privileged under regulations providing that "they shall be kept confidential unless the Commission shall order otherwise." Judge Learned Hand said with regard to these contentions: "Although it does not appear that Grayson asked the Commission to 'order otherwise,' we hold that he was justified in supposing that the prosecution spoke for the Commission and that any request would have been denied. . . . [T]here is an obvious distinction between documents held by officials who are themselves charged with the administration of those laws for whose violation the accused has been indicted, and those which are not so held. All we need to hold—and all that we have held hitherto—is that when the privilege is conditional upon the consent of such a department, the prosecution will fail unless the officials are willing to produce them. We recognize no such incommunicability between officials of the same government; so long as they cannot administer the same law in accord, its penal provisions must remain in abeyance. Half the counts of the indictment charged violations of the Securities Act of 1933, over whose enforcement the Commission presides; the other half, though nominally for abuse of the mails, charged offenses whose gravamen was the same. That put the prosecution and the Commission collectively to a choice, either not to suppress all evidence within their control which bore upon the charges, or to let the offenses go unpunished." 166 F.2d 863, at 870.

it may be argued that while it is true that the executive branch is the public's representative with respect to determining when an action should be brought, once the action has been brought, this discretion has been exercised, and thereafter the public has an interest in litigating to finality on the merits of the action. The government should not be allowed to injure this interest through conduct resulting in the dismissal of the action for reasons having no reference to the merits. To the extent that the reasons for non-disclosure are founded in regard for executive convenience there is no such unity of interests here as was found to justify the sanction of dismissal of a privately brought action; and to the extent that the refusal is based upon genuine considerations of the public interest in the litigation versus the public interest in non-disclosure, the determination is within the sphere of the judiciary. The provisions of the Federal Rules of Civil Procedure with respect to class actions are aimed at an analogous problem. Section 23[27] prohibits the moving party in such a case from dismissing the action or obtaining a compromise without the permission of the court, thus providing for court supervision to see that the other parties in interest are not injured through such dismissal. Similarly, the court should protect the interests of the public in an action brought by the government by making certain that the dismissal sought by the government is based on an insurmountable, genuine evidentiary privilege.

If the government as defendant refuses to comply with a production order, Rule 37(b)(2) allows the court to find against the government on the issue with respect to which the information is important.[28] This sanction is open to objections analogous to the ones outlined above with respect to the application of Rule 37(b)(2) to the government as a moving party. The result may be a finding against the government in a situation where, had the judge inspected the documents, disclosure would have been disallowed on the basis of non-materiality, and conceivably the issue next would have been decided against the plaintiff. Moreover, where the documents are in the possssion of a department or agency other

27. FED. R. CIV. P. 23.

28. O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948), *rev'd* on other grounds, 177 F.2d 971 (1949). The following passage from the decision is illuminating: "No doubt the Attorney General is put to a choice, but it is not in this case (nor will it be in any case) the dilemma between jeopardizing the military or diplomatic interests of the nation and running the risk of losing the lawsuit. The general policy of the common law makes such state secrets absolutely privileged and neither the Act nor the Rules indicate an intention to predicate a default upon refusal to disclose privileged matter—though I see no reason why they might not have done so. The Attorney General's choice is merely between adhering to a general policy which involves little more than departmental routine and permitting the government to incur procedural penalties which may result in a judgment against it, a consequence to which Congress has given the government's consent." 79 F. Supp. 827, at 830.

than that defending the action, the sanction may have no effect. Finally, the government should not be allowed to lose the case on the basis of a usurpation of decisions rightfully within the judicial sphere.

In a recent decision, *U.S. v. Reynolds,*[29] the Supreme Court did outline a method for determining the applicability of evidentiary privilege in cases in which the government is the defendant, a method which vests the decision in the judiciary with some modifications; however, the court here was not faced with the question of which sanctions to apply in case of noncompliance with a court order for production in such a case, as it reversed a holding by the lower court which had found against the government upon the crucial point, merely by pointing to the fact that the plaintiff below had had opportunity to obtain the information needed without production of the documents involved. The court, in a decision by Chief Justice Vinson, said that control over the evidence in court proceedings must remain with the court but that when the judge may be satisfied from the circumstances of the case that there is a reasonable danger that production will impair the national security, he should not insist on production.[30] A reasonable inference from this statement by

---

29. 345 U.S. 1 (1953). In this case the plaintiffs had brought an action under the Federal Torts Claims Act for the deaths of their husbands in an airplane crash. The airplane had been on a trial flight testing electronic equipment when the accident occurred. The issue of judicial or executive determination was squarely presented. Upon refusal by the government to produce records of an investigation of the accident, the District Court had ordered that the fact of the defendant's negligence be taken as determined by virtue of Rule 37 of the Federal Rules of Civil Procedure. This decision was upheld by the Court of Appeals, which was of the opinion that to allow a department head to determine applicability of privilege in an action to which the government is a party would mean abdication of the judicial function and invasion of the province of the judiciary as prescribed by the constitution. The court also feared that to allow such determination by the executive in cases concerned with the state secret privilege would eventually lead to executive determination with respect to all types of information possessed by the executive branch.

The Supreme Court in a split (6-3) decision refused to pass on the question of the power of a department head to withhold from the court documents in his control and instead based its reversal on the ground that the plaintiffs had not shown sufficient necessity for the production of the records to justify the judge's order for delivery of them to the court for the court's inspection to determine whether any privilege attached to them.

30. Under such circumstances, said the Chief Justice, "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." United States v. Reynolds, 345 U.S. 1, 10.

A narrow interpretation of this passage was hinted at in at least one federal decision: "In the imagined but as yet unarticulated case where the document or thing demanded is of such extraordinary character that 'an examination of the evidence, even by the judge alone, in chambers' would 'jeopardize the security which the privilege is meant to protect,' there may be some imperative reason to abstain from compelling even for *in camera* inspection. See United States v. Reynolds, *supra,* 345 U.S. at page 10, 73 S. Ct. 528. It is worth noting however, that the rare case just mentioned was imagined in an action where the Government was not the moving party, but a defendant, and 'only on terms to which it [as sovereign] has consented.' 345 U.S. at page

the Chief Justice is that where the judge is *not* thus satsfied, he may insist on production.

There is dicta to the effect that the "waiver" rule, prohibiting the assertion of governmental privilege from disclosure by the government in a proceeding to which the government is a party, is restricted to actions in which the government is the moving party and is not applicable where the government is the defendant. This was said with reference to the claim of a genuine evidentiary privilege (in this case the state secrets privilege) and would seem to have no application where the claim is based merely upon a departmental regulation prohibiting disclosure.

Conclusion

Remedial action to provide the federal courts with means by which to obtain production of information possessed by the government, subject to their determination of applicability of an evidentiary privilege, may be sought in either the judicial or the legislative field. On the background of the repeated refusals by the Supreme Court to narrow the broad interpretation of its decision in *Boske v. Comingore,* which interpretation allows executive discretion to prevail in the matter of disclosure of information in the possession of the government as evidence in federal courts as well as in state courts, the latter approach seems more realistic. Additional force is lent to this argument by the fact that the executive departments have based their claim of regulatory power to prevent disclosure on their interpretation of a Congressional enabling statute.[31] This interpretation having been sanctioned by the highest court in the country, the logical remedy would seem to lie in legislative modification of this power, in the form of a Congressional mandate to

12, 73 S. Ct. at page 534." United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1954).

31. Presumably in anticipation of a possible overruling of Touhy v. Ragen, 340 U.S. 462 (1951), the government has at times, in addition to its claim of regulatory privilege, based its argument for non-disclosure on a power inherent in the executive, regardless of any enabling statute. For example, in O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948), the government had made the contention that "entirely apart from any statute, the Attorney General personifying the executive branch of the government is free to refuse disclosure of any evidence in his possssion, regardless of its character, for any reason which may seem to him sufficient,—free, in the sense that compulsory process against him is beyond the constitutional power of the legislature to authorize or the Court to issue. . . ." The court found no occasion to hold on this contention.

In this connection the concurring opinion by Justice Frankfurter in Touhy v. Ragen, 340 U.S. 462, 472 (1951), is interesting. He said ". . . the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached. In joining the Court's opinion I assume the contrary—that the Attorney General can be reached by legal process."

the executive departments providing for judicial determination of the applicability of evidentiary privileges.

INTERPRETATION OF THE INTERNAL REVENUE CODE: COURTS v. COMMISSIONER

The Commissioner of Internal Revenue is vested with the responsibility of interpreting and enforcing tax laws,[1] and is normally bound to follow his own interpretation. However, the federal courts also are interpreters of the tax laws. Thus the Commissioner is in a quandary when faced with a court of appeals decision which conflicts with his own interpretation or application of the tax code.[2] The path of direct appeal from the initial adverse decision is practically blocked by the Supreme Court's policy of limited certiorari. Normally the Supreme Court will review a tax case only when it is in conflict with a case previously decided in another circuit.[3] Therefore the Commissioner has a Hobson's choice between accepting the interpretation of the court of appeals, which, in view of the improbability of a contrary decision then arising in another circuit, has the effect of abandoning all hope of a Supreme Court decision, and continuing to apply his own interpretation in the face of a contrary judicial holding.[4] If the Commissioner can, through the latter course, acquire a conflicting decision in another circuit he may be able to receive Supreme Court review of the question, but in the meantime

1. INT. REV. CODE OF 1954, § 7802.

2. See, *e.g.*, Pollak v. Commissioner, 209 F.2d 57 (3rd Cir. 1954); Mutch v. Commissioner, 209 F.2d 390 (3rd Cir. 1954); Abernethy v. Commissioner, 211 F.2d 651 (D.C. Cir. 1954); Kavanagh v. Hershman, 210 F.2d 654 (6th Cir. 1954); United States v. Bennett, 186 F.2d 407 (5th Cir. 1951); Fox v. Commissioner, 190 F.2d 101 (2nd Cir. 1951); Commissioner v. Switlik, 184 F.2d 299 (3rd Cir. 1950); Albright v. United States, 173 F.2d 339 (8th Cir. 1949); Schall v. Commissioner, 174 F.2d 893 (5th Cir. 1949); McDermott v. Commissioner, 150 F.2d 585 (D.C. Cir. 1945).

3. See Rule 19 of RULES OF THE SUP. CT., as revised in 1954, 74 Sup. Ct. 945 (1954).

4. There are several reasons why acquiescing in certain court of appeals decisions may be contrary to the public's interest:

(1) Decisions may unconsciously favor one group of taxpayers. Since taxation must produce a total amount of revenue for government requirements, other taxpayers must bear the increased burden.

(2) The Commissioner may be better able to evaluate the effect of a certain decision on other taxpayers and the country as a whole than can a single court of appeals. See notes 6-10 *infra* and accompanying text.

(3) A taxpayer is not estopped by res judicata or other legal doctrines from litigating a point which he feels has been determined erroneously, merely because another taxpayer litigated the identical point and lost. Nor would it be in the public interest to estop the Commissioner from subsequently re-litigating a point, since the Commissioner is in a better position to evaluate a decision than a single taxpayer.