4/23/63

Memorandum No. 63-25

Subject: Study No. 34(L) - Uniform Rules of Evidence (Rules 34 and 36)

In Memorandum 63-9 it is pointed out that the present text of Rules 34 and 36 is somewhat defective in that they state that the government has no privilege in some cases when all that is meant is that the government must be put to an election whether to rely on the privilege or to suffer an order adverse to it upon the issue on which the privileged information is material. It is the purpose of this memorandum to indicate what the present law is on the subject and to suggest a modification of Rules 34 and 36.

Attached to this memorandum as Exhibit I is a photocopy of the first page of an executive order of the President relating to the classification of information for security purposes. The remainder may be found annotated under 50 U.S.C.A. § 401. It should be considered in connection with the state secrets privilege.

Privileges involved.

Like the original version of the URE, the existing case law recognizes three different privileges in this area; although analysis of the cases may indicate that there are but two. These privileges are the "state secrets" privilege, the "official information" privilege, and the "informer" privilege. The state secrets privilege relates to information vital to national defense or international relations. It was involved in United States v. Reynolds, 345 U.S. 1 (1953). The official information privilege is other information that comes to the attention of governmental officers which the government does not think

should be revealed in the public interest. Information of this sort was involved in Kaiser Aluminum & Chem. Corp. v. U.S., 157 F.Supp 939 (Ct. Cl. 1958) (per Reed (ret.), J.) Finally, there is the informer privilege discussed in the California cases mentioned in Memorandum 63-9.

As a general rule, it may be said that the state secrets privilege is an absolute privilege. United States v. Reynolds, 345 U.S. 1 (1953); Totten v. United States, 92 U.S. 105 (1876). The need for the information in the pending litigation, no matter how great that need, can never justify forcing a breach of the privilege once the court has determined that the privilege exists.

The official information privilege, however, is not absolute. In order to determine whether the privilege exists, it is the function of the court to weigh the interest of society in keeping the information secret against the interest of society in seeing that justice is done in the pending litigation. Naturally, the materiality of the evidence will have some bearing on this. Illustrative are Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962) (in civil suit involving taxes, information in possession of government relating to pending criminal suit against same defendant held privileged) and Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961) (privilege held inapplicable).

The federal cases seem to treat the informer privilege like the official information privilege. Thus, the need for the information is weighed against the desirability for keeping it secret in determining whether or not to recognize the privilege. Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959) (privilege held applicable as defendant showed no great need for information as to informers concerning wage violations).

Criminal cases.

Despite the differences in the privileges, they seem to be handled alike in the criminal cases. If the information is material to the defense of the accused, the prosecution must choose between revealing the information and dismissing the prosecution. This is true even as to state secrets. United States v. Coplon, 185 F.2d 629, 28 A.L.R.2d 1041 (1950). There, the validity of the conviction depended upon whether the evidence introduced at the trial had been obtained from leads developed through wire-tapping. The trial judge had reviewed the government's wire-tap information, in camera, and had concluded that the defendant was properly convicted. The information was shown to the judge in camera because state secrets were involved and it would have prejudiced the security of the United States to have revealed the information publicly.

The Court of Appeals for the Second Circuit reversed because "when the government [chooses] to prosecute an individual for crime, it [is] not free to deny him the right to meet the case made against him by introducing relevant documents, otherwise privileged." Nor can the government, as in the Coplon case, submit such evidence to the judge in secret for his determination because that deprives the defendant of his constitutional right to confront the witnesses against him.

The Jencks Act, 18 U.S.C. §3500, has limited the last holding to a certain extent. Under that act, if a government prosecution witness has made prior statements to the government, the government must submit them in camera to the judge who determines whether they relate to the subject matter of the witness's testimony. If they do not, the

defense never sees the statements. If they do, they are given to the defense so that it may use them for impeachment purposes if it so desires. This procedure is constitutional, even though the defense is not entitled to a hearing on the question of whether the statements relate to the subject matter of the witness's testimony. Scales v. U. S., 367 U.S. 203 (1961); Palermo v. U. S., 360 U.S. 343 (1959).

Civil cases.

The differences between the various privileges are more apparent in the civil cases.

So far as state secrets are concerned, where the government is not the moving party, i.e., where it is in the position of a defendant, it may rely on the state secrets privilege regardless of the prejudice to the plaintiff. This is the holding in United States v. Reynolds, 345 U.S. 1 (1953). There, three civilian observers were killed in an airplane accident during a flight taken for the purpose of testing secret electronic equipment. The widows sued the United States government and moved, under Rule 34 of the Federal Rules, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members. The government asserted the state secrets privilege. The district judge, because of the government's refusal to make discovery, made a peremptory finding against the government on the issue of negligence and, after a trial on the issue of damages, entered judgment against the government. The Supreme Court held that the trial court was in error because the Federal Rules on discovery expressly provide that they do not extend to information which is privileged. The plaintiffs argued that the principle of the

criminal cases should be applied in this civil case. The Supreme Court disposed of the argument with the following language:

> Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

A subsidiary question involved in the Reynolds case was whether the existence of the privilege should depend upon a finding by the court or whether it should depend upon the mere assertion of the privilege by the government. Upon this issue, the Court said:

> The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

The Court went on to explain that the determination of the existence of the privilege should be accomplished in much the same fashion that a court determines whether the privilege against self-incrimination is applicable.

> It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and 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.

The Court explained that if the evidence is important, then the court must probe more extensively to determine whether the claim of

privilege is appropriate; but if the evidence is not very important, the necessity for probing on the part of the judge is minimized.

> Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

Thus, at least where the government is in the position of a civil defendant, the state secrets privilege, where applicable, prevails over the most compelling necessity for the information in the case. Totten v. United States, 92 U.S. 105 (1876), is to the same effect. There, the plaintiff sought to recover on a contract to perform spying services for the United States during the Civil War. The action was dismissed because the basis for the cause of action--the contract--could not be revealed.

Thus, it seems settled that, at least where the government is defendant, the privilege prevails over the most compelling need for disclosure on the part of the plaintiff; and the government may not be put to an election under the discovery rules of disclosing the information or suffering an order adverse to it upon the issue to which the information relates. Cases have not arisen where the state secrets privilege is involved and the government is plaintiff.

So far as the official information privilege is concerned, the courts apparently weigh the interest of society in correctly determining the litigation against the interest of society in maintaining the secrecy of the information in determining whether or not to recognize the privilege. In the Reynolds case, the trial court did just this in regard to information claimed to be subject to the state secrets privilege, required the U.S. to submit the information to the judge in camera, and found against the

U. S. on the issue of negligence when the U. S. refused to comply. The U. S Supreme Court reversed for the reasons indicated above. The language of the Supreme Court is limited to state secrets; hence, we cannot tell at this time what the attitude of the Supreme Court will be towards the asserted privilege for other official information. The lower courts, however, have continued to apply this balancing test in civil litigation.

Some of the earlier cases held that the government waived its governmental privileges when it consented to suit or when it filed suit. But the theory of waiver was rejected in the Reynolds case. This seems proper, for no other person is required to waive his privileges as a condition of litigating.

The current cases, though, apply the balancing test previously referred to. Then, if the court determines that the evidence should not be privileged, it will apply the sanctions permitted under the discovery rules if the government still refuses to make discovery. The Campbell, Olson Rug, and Kaiser Aluminum cases, cited previously, set forth and apply these rules. See also Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958) (privilege held inapplicable, U. S. officer was moving party) and Universal Airline v. Eastern Air Lines, 188 F.2d 993 (D.C. Cir. 1951) (suit between private litigants, CAB must make testimony of investigator available where he is only person in possession of facts).

Commission Rules.

From the foregoing, it appears that the only real distinction is between the state secrets privilege and the official information privilege. The former is absolute, the latter is qualified; but under neither may the government withhold information essential to the defense of a criminal

case and prosecute at the same time. The informer privilege seems to fall into the official information category.

Under the Commission's rules, state secrets and official information have been lumped together. An absolute privilege exists only as to information forbidden to be revealed by statute. A qualified privilege exists as to the remainder. The informer privilege is subject to no balancing of interests test at all--there is no privilege if the information is needed in the pending litigation notwithstanding any statute on the question. As the State Bar points out, there is no provision in our rules for waiver by the head of the appropriate department and there is no recognition that state secrets may be in the possession of non-governmental personnel. Nowhere is it stated that the government must choose between the privilege and prosecution if the information is essential to the defense.

It may be that reliance upon statutory prohibition against revelation for the absolute privilege relating to state secrets may be sufficient. It appears from the attached executive order that everything essential to national defense or international relations has been classified. Although there is no statute directly prohibiting the revealing of classified information to unauthorized persons, the Espionage Act, in 18 U.S.C. 793, provides in part:

> § 793. (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate [etc.] the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) [Same as (d), but applies to persons having unauthorized possession]

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

And 50 U.S.C.A. § 783 provides in part that it is unlawful for any officer or employee of the United States to communicate to a representative of any foreign government or Communist organization "any information of a kind which shall have been classified by the President (or . . . with the approval of the President) as affecting the security of the United States . . . ."

Therefore, it is suggested that Rules 34 and 36 be revised. If, as a matter of policy, the Commission does not choose to rely on the Espionage Act and the reference to information disclosure of which is prohibited by statute, a separate rule applicable to information classified pursuant to presidential authority as requiring protection in the interests of national defense should be drafted. It should be numbered 33 and would read as follows:

33. (1) As used in this rule, "classified security information" means information not open or theretofore officially disclosed to the public that has been classified as affecting the security of the United States pursuant to the authority of the President of the United States.

(2) A witness has a privilege to refuse to disclose a matter on the ground that it is classified security information, and evidence of the matter is inadmissible, unless the judge finds that (a) the matter is not classified security information or (b) the chief officer of the department of government administering the subject matter which the information concerns has consented that it be disclosed in the action.

(3) Nothing in this rule shall be construed to prevent a court from making an order or finding of fact adverse to the people of the State in any criminal action or proceeding upon an issue where the information privileged under this rule is material to the defendant's defense upon that issue.

In any event, the staff suggests that Rule 36 and Rule 34 be incorporated into one rule. It would read as set forth below. If the Commission believes that reliance upon the statutory prohibition against revelation of defense information is sufficient protection for state secrets, the rule set forth just above may be omitted and the underscored language inserted in the rule below:

34. (1) As used in this rule:

(a) "Official information" means information not open or theretofore officially disclosed to the public (i) acquired by a public officer or employee in the course of his duty or transmitted from one public officer or employee to another in the course of his duty, [and includes] including

information as to the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States either directly to a law enforcement officer or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated or to another for the purpose of transmittal to such officer or representative or (ii) involving the public security or concerning the military or naval organization or plans of the United States, or a state or territory, or concerning international relations.

(b) "Public officer or employee" includes an officer or employee of the State, the Regents of the University of California, a county, city, district, public authority, public agency or any other political subdivision or public corporation in this State, and an officer or employee of the United States.

(2) A witness has a privilege to refuse to disclose matter on the ground that it is official information, and evidence of the matter is inadmissible, if the judge finds that the matter is official information and that:

(a) Disclosure is forbidden by an Act of Congress of the United States or a statute of this State; or

(b) Disclosure of the information is against the public interest, after weighing the necessity for preserving the confidentiality of the information as against the necessity for disclosure in the interest of justice, unless the chief officer of the department of government administering the subject matter which the information concerns has consented that it be disclosed in the action.

(3) Nothing in this rule shall be construed to prevent a court from making an order or finding of fact adverse to the people of the State in any criminal action or proceeding upon an issue where the information priviliged under this rule is material to the accused's defense upon that issue and the privilege is claimed by or on behalf of the State, the Regents of the University of California, a county, city, district, public authority, public agency or any other political subdivision or public corporation in this State.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary