#63 5/18/66

Sixth Supplement to Memorandum 66-21

Subject: Study 63(L) - Evidence Code (The Official Information Privilege)

The office of the District Attorney of San Diego County has raised a question concerning the Official Information Privilege. See Exhibit I (pink pages) attached. The question is which agency--the court or the public officer claiming the privilege--should determine whether disclosure of official information is against the public interest?

Under the Evidence Code, the court must hold the information privileged if the court determines that disclosure of the information is prohibited by federal or state statute. If no federal or state statute prohibits disclosure of the information and the public entity claims the privilege, the court is required to prohibit disclosure of official information if the court determines that disclosure of the information is "against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." See Evidence Code Sections 1040 and 915. See also the Official Comment to Section 915.

The office of the District Attorney of San Diego County takes the position that the determination of whether disclosure of the information is against the public interest should be a decision to be made by the public officer and should be conclusive on the court if the public officer acts in good faith.

The existing California law is not entirely clear, but the staff believes that the California Supreme Court would approve the procedure described in People v. Glen Arms Estate, Inc. (the same procedure provided in subdivision (b) of Section 915). See the discussion of this case in Exhibit III (green).

This is consistent with the position of the Uniform Rules of Evidence that this is a matter for the court to determine if the privilege is claimed.

While we are fairly confident that subdivision (b) of Section 915 would be held to codify existing California law, we believe that the question for decision by the Commission is not what the rule is until January 1, 1967, but rather whether the rule expressed in Evidence Code Section 915 should be changed. You will recall the many occasions when this particular matter was discussed by the Commission during the course of drafting the Evidence Code. Hence, we do not propose to discuss the matter in detail in this memorandum.

Professor Wigmore summarizes the case for Section 915 as follows:

> In England, the political minister determines the existence of the privilege; the court passes only on the question whether the claim has been made by the proper person and in the proper form: . . . In the United States, however--if opinions of the courts rather than opinions of the executive are to be the guide--the court determines the claim. This is as it should be. A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court.
>
> It follows that the government must make a showing supporting its plea of privilege. The kind of showing required depends upon the circumstances. When, for example, the claim is that the material contains state secrets, the showing need be slight and the technique of having the judge pursue the material in camera (which may be employed in less sensitive instances) may not be available: [Here follows a discussion of United States v. Reynolds, which you will recall the Commission considered in connection with this privilege.]
>
> On the other hand, where the claim is that the information is merely "official," the government quite properly may be required to disclose it to the judge in camera and bear the burden of persuading the judge that disclosure would be harmful to the government.

The argument in support of the position taken by the office of the San Diego District Attorney is set out in Exhibit II. Consider also Exhibit III. It should be noted that the New Jersey law (a New Jersey case is relied upon in Exhibit II) is now consistent with Evidence Code Section 915. New Jersey Laws 1960, Chapter 52, Section 2A:84A-27 ("No person shall disclose official information of this state or of the United States (a) if disclosure is forbidden by or pursuant to any act of congress or of this state, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.") (Emphasis supplied.) A New York case is also relied upon in Exhibit II. But in Stratford Factors v. New York State Banking Dept., 10 App. Div.2d 66, 197 N. Y. S.2d 375 (1960), the trial court was reversed because it upheld a claim of a statutory privilege to exclude certain "reports of examinations and investigations" without requiring the material claimed to be privileged to be produced for an in camera examination by the court so that the court could determine whether the papers were made confidential by statute. As far as the California cases are concerned, we believe that People v. Glen Arms Estate, Inc. reflects the better view and the view that the California Supreme Court would adopt in the absence of statute.

Exhibit IV (buff) is an opinion of the California Attorney General. Note on page 4 of Exhibit IV the statement given in justification for the English rule:

> It is manifest it must be determined either by the presiding Judge, or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service--an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against.

> It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper; . . . [Emphasis supplied.]

Section 915 meets the problem that led to the adoption of the English rule. Section 915 provides for the judge examining the information in camera.

In conclusion, the staff does not believe a case is made to change Section 915.

Respectfully submitted,

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May 12, 1966

Professor Joseph B. Harvey
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California Law Revision Commission
Stanford University
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Dear Professor Harvey:

Perhaps you will recall that after your excellent talk to the District Attorneys' Association in Los Angeles last February on the Evidence Code, I briefly discussed with you my concern over what effect section 915 of the Evidence Code will have on what is now section 1881(5) of the Code of Civil Procedure, i.e., how the determination of whether the public interest would suffer by the disclosure of confidential information claimed by a public official to be privileged is to be made. The comment to section 915 states that the section is a codification of the existing law, citing, among others, the case of People v. Glen Arms Estate, Inc.

Frankly, I believe the comment is wrong. The reason for my delay in expressing this opinion -- which is done with all respect due the Commission -- is that I had hoped to have an opportunity to prepare material for the Commission which I believed would be more tailored to what the Commission would like. However, due to the extraordinary press of business, I have not been able to do so. And such an opportunity now appears all but impossible in the near future.

And if my views are correct, I certainly would prefer having the question resolved by the Commission rather than having to fight a court battle -- which, now, would be in the face of the Commission's comment.

Therefore, I am enclosing three items: one, a lengthy petition; two, a shorter memorandum which supplements the petition; and, three, an opinion by the Chief Justice written when he was the Attorney General of California.

The first is a copy of the petition which was filed by this office when the reports of one of our investigators were subpoenaed

in a civil (paternity) case. The petition gives the facts. And though some of the arguments contained therein may not be directly in point, perhaps the petition, as a whole, will give the Commission a better appreciation for the problems with which an office such as ours is frequently confronted. Unfortunately, the real party in interest in this particular case withdrew the subpoena in issue which rendered the matter moot and resulted in the appellate court not having an opportunity to give an answer to the questions presented.

The second item is a memorandum written to supplement the petition after the decision in the Glen Arms Estate case. It, also, is self-explanatory.

The third item is a copy of the opinion written by the Chief Justice when he was the Attorney General and which, as I read it, advises that it is for the public officer to determine whether the public interest would suffer by the disclosure of privileged information in the public officer's possession.

I would also like to point up that the reason the Oceanside High School Dist. v. Superior Court (1962) 58 Cal.2d 180, 23 Cal. Rptr.375, 373 P.2d 439 and the San Diego Professional Assn. v. Superior Court (1962) 58 Cal.2d 194, 23 Cal.Rptr. 384, 373 P.2d 448, cases are not specifically treated in the petition are (a) I first overlooked them and (b) after finding them was of the opinion that they were, in principle, sufficiently covered by the cases already cited.

Lastly, in pointing up the types of problems with which offices such as ours are confronted (in addition to that which is shown in the petition) it is not uncommon for an attorney to cause to be issued a subpoena duces tecum for our case files or for reports of investigations of criminal matters by law enforcement agencies, or both, in other ways. For examples, an attorney who represents a defendant in a pending criminal action will file a civil action (e.g., false imprisonment) arising out of the same facts and, ostensibly under civil discovery in the civil action, will cause to be issued a subpoena duces tecum (perhaps, also, for a deposition) to discover the files in our possession and those in the possession of the police (and, when calling for a deposition, will attempt to examine the police officers and the deputy district attorney assigned to the case); this has been done when the criminal action is pending despite the fact that the

civil action would not go to trial for many months hence and despite the fact that the attorney has not attempted, formally or informally, to pursue his rights of criminal discovery. Attorneys representing defendants in criminal actions have also taken a more direct approach by causing a subpoena duces tecum to be issued calling for the police reports, etc. when, again, they have not attempted, formally or informally, to pursue their clients' rights of criminal discovery.

I know I have asked for a considerable amount of your time, but the question is an important one to this office. Please feel free to make any use of the enclosures as you or the Commission might deem appropriate.

Lastly, Mr. Keller sends his warmest personal regards to you.

Sincerely yours,

JAMES DON KELLER
District Attorney

by
RICHARD H. BEIN
Deputy District Attorney

RHB/jk
Encs.

6th Supp. Memo 66-21

EXHIBIT II

EXTRACT FROM PETITION

V

WHETHER THE PUBLIC INTEREST WOULD SUFFER BY THE DISCLOSURE OF A COMMUNICATION MADE WITHIN THE MEANING OF §1881(5) IS A DETERMINATION TO BE MADE IN GOOD FAITH BY THE PUBLIC OFFICER

Having shown that the communications made by Sheila to petitioner are privileged and confidential within the meaning of §1881(5), the next question which must be answered is: Who is to determine "when the public interest would suffer by disclosure" of such a confidential communication? That is, does the public officer or does the court decide whether in a particular case the public interest would suffer by the disclosure of a confidential communication made to the public officer. The answer to this question is not clear. But the weight of authority and the practical considerations indicate that the determination of whether the public interest would suffer by the disclosure of confidential communications which are within the purview of §1881(5) is to be made by the public officer acting in good faith.

The California case which contains dicta contrary to

petitioner's position is Markwell vs. Sykes, 1959, 173 Cal. App.2d 642, 343 P.2d 769. However, the authorities cited in the Sykes decision, supra, do not, when analyzed, support its dicta.

The case of People vs. Curry, 1950, 97 Cal.App.2d 537, 281 P.2d 153, cited in the Sykes decision, supra, is not authority for the proposition that the court, rather than the public officer, is to determine whether disclosure of a confidential communication within the purview of §1881(5) will cause the public interest to suffer.

In Curry, supra, the court was deciding whether statements made by the defendant in a criminal action to a probation officer which were inconsistent with his sworn testimony were privileged within §1881(5). It was the defendant's contention that his statements were privileged; that is, the public officer, whether or not he was a public officer within the meaning of §1881(5), was not claiming the privilege. Thus, the Curry decision, supra, is not authority for the question here presented for several reasons: (1) As is pointed out in the Sykes decision, supra, it is the public officer who must claim the §1881(5) privilege, and if he fails to do so it may, as in the Sykes case, result in a waiver of the privilege; (2) statements made by a defendant in a criminal action to a prosecutor or a law enforcement agent are not intended to be made in confidence; and (3) the

the court there properly made the determination as to whether disclosure of the communication would cause the public interest to suffer as the communication was made to the court by virtue of the fact that a probation officer is an agent of the court; the court, therefore, was the public officer to whom the communication was made and it then made the decision whether the disclosure of the communication would cause the public interest to suffer.

The Curry decision, supra, is authority for the proposition that the court determines if §1881(5) applies. Petitioner does not quarrel with this rule, i.e., petitioner agrees that the court must determine if the person to whom the communication was made is a public officer within the meaning of §1881(5) and it must determine if the communication was of a confidential nature. But, as shown in the above arguments, both of these determinations have been made. And the Curry decision, supra, is not authority for the proposition that the court, after determining that §1881(5) applies, must then go forward and examine the communications which were made and make the additional determination of whether the communication, if disclosed, would cause the public interest to suffer.

The Sykes decision, supra, also cites Dwelly vs. McReynolds, 1936, 6 Cal.2d 128, 121, 56 P.2d 1232. But here, again, all the court in the McReynolds case, supra, held relative to the issue here presented is that it is for the

court to determine whether the communication was privileged within the meaning of §1881(5). The court did not consider the question of who is to determine if disclosure of the communication would cause the public interest to suffer.

Though Professor Wigmore was of the opinion that the court should determine whether disclosure of a privileged communication made to a public officer would cause the public interest to suffer because he was apprehensive of the consequences which might follow from allowing the public officer to make the determination,[3] his fears have not necessarily been shared by the courts.[4]

Another California case cited in the Sykes decision, supra, as authority for its dicta is Holm vs. Superior Court, 1954, 42 Cal.2d 500, 507, 267 P.2d 1025, 268 P.2d 722. But the language referred to in the Holm case, supra, does not support the dicta in Sykes. In Holm, the court merely states that it is for the court to determine whether a communication was intended to be confidential. The court then holds that if the communication is made to an attorney for a single purpose the court is to decide whether the communication falls within the purview of §1881(2); and if the communication was made to an attorney for a dual purpose, the court must determine, according to the evidence taken for this purpose,

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3/ 8 Wigmore on Evidence, 3d Ed., p. 798, §2379.

4/ Lewis vs. Roux Trucking Corp., 1927, 222 App.Div. 204, 226 N.Y. Supp. 70.

whether the "dominant" purpose was a confidential communication within §1881(2) and then declare, accordingly, whether the privilege of §1881(2) attaches to the communication. The court in Holm, supra, did not have §1881(5) before it; it was deciding a question which arose under §1881(2)--the attorney-client privilege. Thus the Holm decision neither touched upon the language in §1881(5) nor suggested the procedure which should be adopted in applying §1881(5). And, of course, a decision is not authority for a proposition not considered. People vs. Cole, 1964, 226 A.C.A. 187, 37 Cal. Rptr. 798.

The Sykes decision, supra, also refers to Volume 95 of the Lawyers Edition of the United States Supreme Court at page 451 and Volume 97 of the same reports at page 740 as additional authority for the proposition that it is for the court to determine whether the disclosure of a communication within §1881(5) would cause the public interest to suffer. Neither of these citations, however, contain authority for the proposition advanced in the Sykes dicta. Both collections of cases, of course, contain federal decisions.[5/]

5/ And many of the federal decisions which petitioner here brings before this court are not cited or discussed. Additional collections of cases which deal with the questions presented in this petition and which may assist this court are: 165 A.L.R. 1302: Anno.--Forbidding Disclosure By Public Officers, which annotation supersedes and supplements 47 A.L.R. 694: Anno.--Statute Forbidding Disclosure By Official; 9 A.L. R. 1099: Anno.--Evidence: Privilege of Communication Made to Public Officer, which annotation is supplemented by 59 A.L.R. 1555: Anno.--Evidence--Official Communication--Privilege; and 140 A.L.R. 1466: Anno.--Defamation--Communi-

Both the Sykes and Curry decisions, supra, cite Crosby vs. Pacific S.S. Lines, 9 Cir. 1943, 133 F. 2d 470, for the proposition that the court is to make the decision as to whether the disclosure of a communication within §1881(5) would cause the public interest to suffer. The Curry decision, supra, cites the following dicta from the Crosby case, supra: "All reason says that the question is one for the court to determine." The "reason" cited as authority for the dicta in the Crosby case by the federal court is the same reason as given by Professor Wigmore.[6/] But as has been shown in Lewis vs. Roux Trucking Corp., supra, such reason is not "all" reason. Moreover, if the courts are to determine this question, is there any privilege? The decision in the case of Boske vs. Comingore, 1900, 177 U.S. 459, 20 Sup. Ct. 701, 44 L.Ed. 846, seems to indicate that such a rule would render the privilege meaningless.

Furthermore, that the Sykes dicta is just that--and not the law of this state--is shown by the case of Chronicle Publishing Co. vs. Superior Court, 1960, 54 Cal.2d 548, 7 Cal.Rptr. 109, 354 P.2d 637. The Sykes decision is cited

cation to Police (IV. Communication to prosecuting attorneys, p.1474, et seq.).

Also, the student comment in 22 Cal.L.Rev. 667-677 (1933-34); Privilege for Communications to Police Officers and For Private Records of Police Departments is extensively researched and may be of assistance to the court.

6/ 8 Wigmore on Evidence, §2379, supra, footnote 3, page 29.

by the Court and the Court approves of the following language from the Sykes decision:

> "...'The privilege is for the benefit of the state * * * or its agencies and the cloak of testimonial immunity is thrown only around such public officials * * * [T]he existence of a privilege in the state presents a question for the court * * *.'..." (7 Cal.Rptr. at 119.)

It is to be noted that the Supreme Court does not--with the dicta of Sykes squarely before it--go on to approve of the proposition that it is for the court to also determine whether disclosure of a communication within §1881(5) would cause the public interest to suffer. But, rather, the court states that the law is as petitioner contends it to be.

And can the courts make such a decision? In every instance where a court would be called upon to decide this question it would be limited to the facts of the case before it. And the public interest, as in the case at bar with the files of a prosecuting attorney, involves considerations which reach far beyond the scope of any particular case. Then, too, it must be remembered that the public has expressed its confidence in its public officers, such as petitioner, by electing them into office. Is this public confidence--and the trust it necessarily imports--so meaningless that

the courts cannot or should not accept the good faith representations of public officers? Also, it must be remembered that each public officer is a specialist. For example, petitioner specializes in protecting the public welfare by performing the given duty of prosecuting those who commit public offenses; he works closely with law enforcement agencies and the private citizens who he represents in his capacity as the prosecuting attorney; he is in the best position to determine what effect would be had or what consequences would follow if information communicated to him were to be made public. And, contrary to Professor Wigmore's expressed fears, what abuses has the privilege which has been given to public officers by the legislature led to over the years? Must we be ruled by shadows and ghosts? Professor Wigmore advocates that the courts should decide this question because, inter alia, the courts will act in good faith. Must we presume that all public officers will act in bad faith? And if the privilege which the legislature has given to public officers presents such a potential danger, would it not be appropriate for the legislature to withdraw or restrict the privilege?

Our Supreme Court does not approve of the presumption that public officers will abuse the privileges of their offices. Nor does it disapprove of the policy which allows a degree of secrecy in the conduct of the affairs of public

officers. To the contrary, and, it would seem, to the contrary of Professor Wigmore, our court presumes that the public officers will perform the duties of their offices and that there is a need for secrecy and non-disclosure in the conduct of certain affairs administered by public officers. Thus, in the Chronicle Publishing Co. case, supra, our court stated:

> "...'It is presumed that the members of the [State Bar] committee, being public officers [emphasis the court's], regularly performed their duty * * *.' ... Thus the Board of Governors of the State Bar and its secretary not only come within the spirit of section 1881 but actually are 'public officer(s)' within its terms." (7 Cal. Rptr., at 118.)

And, later in the opinion, the court approves of the language used in People vs. Pearson, supra, 111 Cal.App.2d 9, 24, 244 P.2d 35, 47, where the court stated:

> "See also [the Pearson case] where it is held that papers of a sheriff's department vice squad were not open to public inspection. 'Public policy requires that documents in the sheriff's office relating to law enforcement be treated as confidential.

* * * The contents of such documents are not to be divulged by their custodian when their secrecy would serve the public interest.'"
(7 Cal.Rptr., at 120.)

This court must, in a final analysis, determine what the legislature intended by its language when it enacted §1881(5). To determine this, let us first look to the cases which, contrary to the Sykes decision, indicate that the only determination which the court is to make in this regard is whether the public officer asserting the privilege is acting in good faith and he is of the opinion that the disclosure of a communication within §1881(5) would cause the public interest to suffer then that answer is to be accepted by the court and the court's inquiry is at an end.

An interesting case on this point is People vs. Alaniz, 1957, 149 Cal.App.2d 560, 309 P.2d 71. 7/ There, in the opinion of Mr. Justice Wood, the procedure of allowing the witness (i.e., the public officer) to determine whether the public interest would suffer by the disclosure of a communication which was within §1881(5) is approved. There, after citing §1881(5), Mr. Justice Wood states:

"... Officer Smith testified that the information given by the informers was con-

7/ This case was overruled on other considerations in Preistly vs. Superior Court, 1958, 50 Cal.2d 812, 320 P.2d 39.

fidential and the public interest would suffer if the names of the informers were disclosed. In People vs. Gonzales, 141 Cal.App.2d 604 [297 P.2d 50], it was held (pp. 607-608 that, under the circumstances therein, the court did not err in refusing to allow the defendant to cross-examine the police officers as to the name of their informant. It was said in that case at page 608: 'The officer's information must have come from a reliable [emphasis the court's] source and the officer must act in good faith in testifying that he had received his information from a reliable person, and such good faith must pass the scrutiny of the trial judge. No abuse of discretion having been shown, the court's ruling was correct.' In the present case, the court did not err in sustaining objections to questions as to the identity of the informers." (141 Cal.App. 2d, at 567).

That the opinion of Mr. Justice Wood was meant to stand for the rule that the public officer acting in good faith is to make the determination as to whether the public interest would suffer by the disclosure of a communication within §1881(5) is shown by the dissent of Mr. Justice Vallée.

In his dissent, Mr. Justice Vallee states that "... [t]his procedure was manifestly wrong. The authorities are legion that it is for the court, not the witness, to determine whether the communications were made in official confidence and whether the public interest would suffer by disclosure..." (149 Cal.App.2d, at 580.) The "legion" of authorities then cited in a footnote to the dissent amounts to 8 Wigmore on Evidence, 3d Ed., 799, §2379, supra. As petitioner has stated above, he agrees that the authorities state the rule that it is for the court to determine whether a communication was made to a public officer in confidence. But, again, where does one find the "legion" of authorities supporting the dissents second proposition, i.e., that it is also for the court to determine if the disclosure of a communication within §1881(5) would cause the public interest to suffer? The only authority cited by the dissent is Professor Wigmore.

In his §2379, Professor Wigmore cites many authorities for the proposition, conceded by petitioner, that the court is to determine if the communication was made in confidence to a public officer. But let us look at the authorities which he cites in support of his contention that the court is to determine whether the public interest would suffer by the disclosure of a communication made within §1881(5). And let us also examine the authorities which he does not

cite which are contrary to the rule which he proposes.[8/]

As authority for his proposed rule, Professor Wigmore cites the opinion of Chief Justice Marshall in the trial of Aaron Burr (Aaron Burr's Trial, Robertson's Rep. I, 121, 127, 186, 255, II, 536). But he does not point up that this case has been judicially interpreted as supporting petitioner's position in the case at bar. Thus, in Thompson vs. German Valley R. R., 1871, 22 N.J. Eq. 111, where a subpoena duces tecum had been served on the governor commanding him to appear and testify and to bring with him an engrossed copy of a private statute which had been passed by the legislature and sent to him, as governor, for approval, the court stated:

> "... Whether the highest officer in the government or state will be compelled to produce in court any paper or document in his possession, is a different question. And the rule adopted in such cases is, that he will be allowed to withhold any paper or document in his possession, or any part of it, if, in his opinion, his official duty requires him to do so. These were the rules adopted by Chief Juntice [sic] Marshall in

8/ The fact that Professor Wigmore found it necessary to propose what should be done lends credence to the belief that the rule is different; else why advocate a change? Or, even if the rule was not firmly established as contrary to view he preferred, if the rule was not open to question why advocate a solution?

the trial of Aaron Burr ... 1 Burr's Trial 182; 2 Ibid. 535-6."

Professor Wigmore also cites British cases in support of his proposed rule. But, though he cites Beaston vs. Skene, 1860, 5 H. & N. 838, for the purpose of criticizing the court's decision for having announced the rule which is contrary to his proposed rule, he fails to cite or criticize in his §2379 the following British cases: Hennessey vs. Wright, 1881, 21 Q.B.D. 509; Hughe vs. Vargas, 1893, 9 T.R. 661; Trial of Steinie Morrison (Notable British Trials 1911) 240; Asiatic Petroleum Co. vs. Anglo-Persian Oil Co., 1916, 1 K.B. 822; and Ankin vs. London & North Eastern Railway, 1930, 1 K.B. 527. And though he criticizes the court in the Beaston case because the court did not believe itself competent to decide the broad question there, as here, presented, he fails to criticize the court in Lord's Comm'rs of the Admiralty vs. Aberdeen Steam and Fishing Co., Ltd., 1910, S.C. 335, where, at 340-341, the court is also of the opinion that considerations of public interest are based on matters not in the possession of the court. Likewise, Professor Wigmore cites the Canadian case of Gugy vs. Maguire, 1863, 13 Low. Can. 33, but he does not cite in his §2379 the case of Bradley vs. McIntosh, 1883, 5 Ont. Rep. 227.

In his citations in §2379 of United States courts and of courts of the several states which support his thesis,

Professor Wigmore again apparently overlooked cases which are contrary to his proposed rule. He not only fails to analyze Lewis vs. Roux Trucking Corp., supra, 222 App.Div. 204, 226 N.Y. Supp. 70, where the court expressly disagrees with some of his recommendations and conclusions, but other cases have been overlooked.

In the case of Gray vs. Pentland, Pa. 1815, 2 S. & R. 23, where a subpoena duces tecum was directed to the governor commanding him, inter alia, to produce a written document, the court held that the governor, to whom the subpoena was addressed, must exercise his own judgment with respect to the propriety of producing the writing.

And in Boske vs. Comingore, supra, 177 U.S. 459, 20 Sup.Ct. 701, 44 L.Ed. 846, Justice Harlan's opinion for the court suggests that if a public agency or department does not have the right to determine the use and preservation of its records, papers and property there would be no privilege. The opinion states:

> "... The papers in question, copies of which were sought from appellee [government agent], were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. Reasons of pub-

lic policy may well have suggested the necessity, in the interest of the government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded...

"In our opinion the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collections of the revenue, and reserve for his own determination all matters of that character." (177 U.S., at 469-470.)

But, once again, the decision of this court on this question must depend upon what the legislature meant when, in 1872, it enacted what is now §1881(5). If the legislature intended for the court to determine whether disclosure of a communication within §1881(5) would cause the public

interest to suffer it is, in petitioner's view, fair to assume that the legislature would have so stated. If, for example, §1881(5) was amended to read as does the comparable Colorado statute, then it would be for the court to decide the question. Note the otherwise identical language in the Colorado statute which governs this question:

> "153-1-7. Who May Not Testify Without Consent.--There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:
>
> " * * *
>
> "(5) A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure.
>
> " * * * ."
>
> (Colo.Rev.Stats. Vol. 6, 1953, Chap. 153,Art. 1,§7.)

If the Colorado legislature had not been of the opinion that the rule would be the same without adding "in the judgment of the court," then the court must hold that the legislatures use language without meaning or purpose. Thus, the only logical reason why Colorado would add the additional

language would be to make the rule different from what it would be without the additional language. And if the California legislature intended to have the Colorado rule, it must be assumed that they would have so stated by adding language similar to that used by the Colorado legislature.

If, however, we are not to attribute meaningless acts or meaningless words to the legislature, how do we explain the use of the phrase "when the public interest would suffer by disclosure?" It is at this point that petitioner and the trial court took different views: The trial court assumed that the information which respondent endeavors to have revealed to him was a communication within §1881(5) but, when coming upon the above quoted phrase the trial court stated that it must have some meaning and, contrary to petitioner's position that it meant that a communication within §1881(5) can be disclosed when the public official determines that such a disclosure would not cause the public interest to suffer, the trial court then held that the only meaning the phrase could be given is that the court must study the communication and then it, the court, must determine if disclosure of the communication would cause the public interest to suffer. Petitioner agrees that the phrase must be given meaning. But petitioner disagrees that the phrase means what the trial court held it to mean.

All of the foregoing argument and the authorities cited

support petitioner. But there is more. First, §1881(5) and its preamble must be read as a whole. This leads to but one logical interpretation; one interpretation which is consistent with the spirit and the policy of the section and with the authorities which petitioner has cited in support of his position. The answer is seen in the Chronicle Publishing Co. decision. The court there states:

> "... As to all of the confidential communications made privileged by section 1881, Code of Civil Procedure, there is a right in someone or ones to waive the privilege. Thus, a husband and wife may waive their privilege, a client may waive the attorney and the client privilege, a confessant, a patient, a publisher, editor or reporter may waive his respective privilege, and a public officer when in his judgment the public interest would not suffer, may disclose communications made to him in official confidence." (Emphasis added.) (7 Cal.Rptr., at 121).

Therefore, from the above language, we not only see that it is public officer who determines whether disclosure of a communication within §1881(5) would cause the public interest to suffer but we also see why the phrase "when the public interest would suffer by disclosure" was placed in

§1881(5) by the legislature: It was placed there not to qualify the privilege given the public officer by the legislature but, rather it was placed there to qualify the right of the public official to waive the privilege; i.e., even a public officer to whom a §1881(5) communication is made cannot waive the privilege if disclosure would cause the public interest to suffer, he can only waive the privilege when in his good faith judgment disclosure of the communication will not cause the public interest to suffer.

It is clear, therefore, that in California it is the public officer acting in good faith who determines whether the disclosure of a communication within §1881(5) would cause the public interest to suffer. And, especially in petitioner's circumstances, logic and public policy support petitioner's position. One can easily see what the results would be if petitioner was required to say, to the Sheila's and to all other citizens who might come to petitioner to bring petitioner's attention to the possible commission of a public offense: "We thank you for coming forward; we thank you for doing your duty. But we must also tell you that whatever you say might, depending upon how a judge views the matter, be used against you as we cannot guarantee--even if what you may tell us does not result in a prosecution--that what you may want to report can be done in confidence. And, consequently, we cannot give any guarantee that, in return for

doing your duty as a citizen and in the exercise of your rights as a citizen, we, in turn, can protect you." No, petitioner contends that any rule other than that which he here advances can only cause severe injury to the public's interest.

EXHIBIT III

6th Supp. to Memo 66-21

January 29, 1965

MEMORANDUM

To: Claude E. Brown, Assistant District Attorney
From: Richard H. Bein, Deputy District Attorney

Subject: Disclosure of Confidential Communications Made to and Investigation Files of Police and Prosecutors; Proposed Amendment to Civil Code of Procedure, Section 1881.

The recent cases of People Ex Rel. Dept. of Public Works v. Glen Arms Estate, Inc., 1964, 230 A.C.A. 912, 41 Cal.Rptr. 303, again points up the question of who determines whether the public interest will suffer by the disclosure of a confidential communication made within §1881.5.

It is our contention (see Petition for Writ of Prohibition in James Don Keller v. Superior Court, D.C.A., 4th App. Dist., No. 4 CIV 7912, hereinafter referred to as our "petition") that in our cases and with regard to our and police files we, i.e., the public officer, determine whether the public interest will suffer by the disclosure of a communication privileged within §1881.5. The position against which we are arguing, is that it is the judge in camera who makes this determination.

The Glen Arms Estate case, supra, is a cloud on our position—which even before was not as bright as we would have liked. In this case (an eminent domain proceeding) a right-of-way agent for the State Division of Highways and, therefore, a public employee, made an appraisal of certain property. This appraisal was communicated to the People's attorney for the purposes of negotiation and was considered by the People to be a confidential communication. An attempt was made to have the appraisal report introduced into evidence; the People objected, primarily, on the ground that the report was a privileged communication within the attorney-client privilege (C.C.P. §1881.2). The trial court held the report to be within the attorney-client privilege and excluded the report from evidence.

On appeal, the District Court of Appeal (First Appellate District) affirmed the trial court's ruling based on the facts

found by the trial court.* The problem—or cloud—in this case, however, arises in the D.C.A.'s footnote 1 (230 A.C.A., at 917-918) where the Court states:

> "In the brief of plaintiff and respondent on file herein it is stated that '[r]espondent's counsel asserted the attorney-client privilege.' That part of the record to which we are referred as supportive of the statement (Cal. Rules of Court, Rule 15(a)) discloses that plaintiff's counsel merely stated that 'the plaintiff here asserts the privilege' without indicating what privilege was being asserted. We shall therefore treat the assertion made at this point of the proceedings as that of the attorney-client privilege. (Code Civ. Proc. §1881, subd. 2.) However, we observe that during the ensuing interrogation of Nowicki and the subsequent argument of counsel, the record indicates an attempt by plaintiff's counsel also to assert the public-official privilege (Code Civ.Proc. §1881, subd.5). As we note infra, plaintiff asserts both privileges on this appeal.
>
> "Under the circumstances we comment briefly on the in camera inspection procedure which plaintiff's counsel suggested to the trial judge. When the asserted privilege is that applying to state secrets (see United States v. Burr (Va. 1807) 25 F.Cas. 30, F.Cas. No. 14692d; United States v. Reynolds (1953) 345 U.S. 1, 7 [73 S. Ct. 528, 97 L.Ed. 727, 732-733, 32 A.L.R. 2d 382, 388]; 8 Wigmore on Evidence, McNaughton Rev. 1961, §2378, p. 792) or to official communications (Code Civ. Proc. §1881, subd. 5), the government may often be required to disclose the material which is claimed to be privileged to the judge for perusal in camera in bearing the burden of persuading the judge that disclosure would be harmful to the government. (Halpern v. United States (2d Cir. 1958) 258 F.2d 36,44; Mitchell v. Bass (8th Cir. 1958) 252 F.2d 513, 517; Cresmer v. United States (D.C.N.Y. 1949) 9 F.R.D. 203,204; United States v. Cotton Valley Operators Committee (D.C.La. 1949) 9 F.R.D. 719, 720-721, aff'd by divided court (1950) 339 U.S.

*This holding would be some authority supporting our secondary position, as set forth in our petition, that communications made to our office by citizens or the police are within the attorney-client privilege as they are--as are police investigation files--primarily received for the purpose of preparing for [illegible]tion.

940 [70 S.Ct. 793, 94 L.Ed. 1356]; 8 Wigmore, op.cit., §2379, pp. 810-812.) When the privilege of official communications is claimed as a ground for excluding a document from evidence the question for the trial judge is whether the public interest will suffer. (Cf. Jessup v. Superior Court (1957) 151 Cal.App.2d 102, 108 [311 P.2d 177]; People v. Curry (1950) 97 Cal.App.2d 537, 548 [218 P.2d 153] (overruled on other grounds in People v. McCaughan (1957) 49 Cal.2d 409, 420 [317 P.2d 974]); see also People v. Donne (1956) 141 Cal.App.2d 499, 512 [297 P.2d 451].) It was not inappropriate in the instant case, therefore, for plaintiff's counsel Mr. Rogers to offer the report to the court for examination in camera if he was claiming that the report was privileged as an official document under the provisions of Code Civ.Proc. §1881, subd. 5.

"However, when the sole privilege being claimed is that of a communication between attorney and client it is not usually customary or necessary for the court to examine the allegedly privileged document itself, since the factual determination by the court does not involve the nature of the contents of the document and the effect of their disclosure but, rather, it involves the existence of the relationship at the time of the communication, the intent of the client, and whether the communication emanates from the client. See, for example, San Diego Professional Assn. v. Superior Court, supra, 58 Cal.2d 194, 202, fn. 5, where the court, in the course of deciding whether or not a report was a confidential communication, made clear that it desired 'to avoid any suggestion that it might be necessary for a party to divulge the contents of a report in order to sustain a claim of privilege.' (For examples of cases holding that the contents of the documents or communications themselves need not be disclosed in order to prove the claimed privilege see Ex parte Miday (1908) 15 Idaho 559 [98 P.845, 846]; Bejac v. Wilson (1921) 27 N.M. 112 [196 P.513, 514].)

From the Court's opinion in the Glen Arms Estate case, supra, it would appear that the People (who were represented

by a private law firm) conceded, at least by conduct, that it was for the judge *in camera* to determine whether the public interest would suffer by the disclosure of a communication which was otherwise privileged within §1881.5.

As is shown in the above quoted footnote, the D.C.A.'s dicta is contrary to our interpretation of §1881.5. The case of Chronicle Publishing Co. v. Superior Court, 1960, 54 Cal.2d 548, 7 Cal.Rptr. 109, 354 P.2d 637, was cited by the D.C.A. in its opinion but the D.C.A. did not cite the case as having any bearing on its dicta as it set such dicta forth in its footnote, supra. And the Chronicle Publishing Co. case, id., is the best authority we have in support of our position. Specifically, the Court there stated:

> "...As to all of the confidential communications made privileged by section 1881, ... there is a right in some one or ones to waive the privilege. Thus, a husband and wife may waive their privilege, a client may waive the attorney and the client privilege, a confessant, a patient, a publisher, editor or reporter may waive his respective privilege, and a public officer when in his judgment the public interest would not suffer, may disclose communications made to him in official confidence." (Emphasis added.) (7 Cal.Rptr., at 121.)

Not having considered the above language from the Chronicle Publishing Co. case, id., in its dicta, it is possible that the Glen Arms Estate dicta could be argued against successfully. But, in any case, it still creates another problem when no other problems are welcome.

District Attorneys, prosecutors and police may take §1881.5 for granted, believing that there is no cloud on their privilege. But perhaps the District Attorney's Association should be informed of the questions in this area and perhaps they should recommend an amendment to §1881 to make clear the correctness of the position we have taken.

Such a position is not at odds with the rule that an informant must be disclosed to a defendant in certain cases. Indeed, that rule is consistent with our interpretation of §1881.5 in that in such cases the courts do not compel the district attorney to disclose the identity of the informant if the district attorney refuses to make such information known; instead, if the district attorney takes the position that the informant (i.e., the public) might suffer by such a disclosure, the case is dismissed. The district attorney, therefore, is actually making the determination of whether the public inter-

est would suffer by disclosure of confidential information privileged within §1881.5; the judge does not make such a determination in camera. ([illegible])

If necessary and without too much additional work, our petition could be worked over for presentation to the District Attorney's Association.

Respectfully submitted,

/

Richard H. Bein
Deputy District Attorney

EXHIBIT IV

An Supp to Memo 66-21

VOL. 1, APPENDIX TO JOURNAL OF THE SENATE, 1955, SPECIAL SENATE COMM FOR GOVT ADMIN.

* * *

San Francisco, December 12, 1939

Honorable George W. Mordecai
District Attorney of Madera County

I have before me your communication under date of December 5, 1939, which is as follows:

> "The Sheriff of Madera County and I have been served with the enclosed subpoenas duces tecum by the subcommittee of the Committee on Education and Labor of the United States Senate presently sitting in the City and County of San Francisco for the purpose of taking testimony under the authority of a resolution of the United States Senate.
>
> These subpoenas call for a mass of documents bearing on law enforcement conditions in Madera County. Some of them are part and parcel of pending criminal cases and investigations in the detection of crime, all of which are of a highly confidential character. It is our desire to cooperate with the Committee and produce any and all documents the disclosure of which will not interfere with our obligations as law enforcement officers and I would therefore request your opinion as to our duty under these subpoenas to the Committee and to the people whom we serve."

The subpoenas duces tecum served upon you and Sheriff W. O. Justice of Madera County are similar in their general import and requirements, and will therefore here be considered together, for the principles and rules which will be hereinafter announced apply alike both to the district attorney and the sheriff of any county of the State of California.

The documents and information called for in the subpoena fall generally into five classifications, as follows:

1. Public records or copies thereof which are in your possession, or copies of public records in your possession the originals of which are in the possession of other State, county, township or municipal officers;
2. Public records not in your possession;
3. Correspondence, documents, records and information (other than public records and documents), and correspondence with private individuals, corporations and associations;
4. Reports of and information concerning or received from informers; and
5. Reports of and information concerning or received from undercover employees, and inter-office and interdepartmental communications.

You state your desire to cooperate with the Committee and to produce any and all documents the disclosure of which will not interfere with your obligations as law enforcement officers; and with most of the classifications above set forth little difficulty should be experienced in extending such cooperation.

With regard to classifications 1 and 2, you should make available to the Committee all public records or copies of public records which you have in your possession, and with regard to such records not in your possession and of which you do not have copies, you should fully advise the Committee as to the office in which the same may be found, if such information is within your knowledge.

With regard to the third classification, you should make full disclosure of the correspondence, documents, records, etc. therein referred to, where such disclosure would not violate the rule of privileged communications hereinafter referred to.

It is only with regard to the fourth and fifth classifications above set forth that a substantial question arises.

Under the English common law it was early recognized that in many instances a public officer was a trustee on behalf of the public of information acquired by him in his official capacity and in confidence, and that rule was well expressed by Mr. Justice Gray of the Supreme Judicial Court of the State of Massachusetts in the case of *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 726, wherein he said:

> "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice, therefore, will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. 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, because of the confidential nature of such communication."

The rule was also early recognized by the Attorney General of the United States and expressed in an opinion addressed by that officer to the Secretary of the Treasury in 1877. (Opinions of Attorney General, Vol. XV, page 378.)

Even the Congress of the United States has, in effect, recognized this question of privilege by authorizing certain departments of the Federal government—notably the Treasury Department and the Federal Bureau of Investigation of the Department of Justice—to adopt rules and regulations, under which legislative authority rules and regulations with regard to the secrecy and privilege of documents and information of the character with which we are here concerned have been adopted, and sustained by the Federal courts.

The United States Department of Justice, for example, adopted the following rule for the Division of Investigation:

> "Records and Information. All records and information in the offices of the Division of Investigation are in the custody and control of the division for the purpose of the detection and prosecution of crimes against the United States or the preparation of cases in which the United States is or may be a party in interest. Employees have no control over such records or information, with regard to permitting the use of same for any other than official purposes, except in the discretion of the Attorney General or an Assistant Attorney General acting for him. Employees are hereby prohibited from presenting such records or information in a state court, whether in answer to a subpoena duces tecum or otherwise. Whenever a state court subpoena shall have been served upon them they will appear in court and respectfully decline to present the records or divulge the information called for, basing their refusal upon this rule.
>
> * * * * * * *
>
> "With regard to employees testifying on official matters of a confidential nature in a Federal court, consideration must be given to each individual case as it arises. The division will offer every possible assistance to the courts. Nevertheless, the question of disclosing privileged information is a matter

entirely in the discretion of the head of the department, and should an attorney for a defendant attempt to compel an employee to disclose sources of official information or similar matter deemed to be confidential, the employee shall respectfully decline to answer. If his reasons are requested by the court, he shall courteously state that the matter is privileged and can not be disclosed without specific approval from the department. The United States attorney should be promptly consulted and his advice followed."

In the case of *Ex parte Sackett*, 74 Fed. (2d) 922, privilege was claimed by an acting special agent in charge of the division of investigation in the United States Department of Justice, under the authority of the rule above referred to. The court said in part:

"In view of the fact that under these regulations the documents, although physically in the possession of the witness, are in law in the custody of the Attorney General, and he is prohibited from producing them by the lawful rule of the Department, **the court had no power or authority to compel him to do so.**"

See also the case of *Harwood* v. *McMurtry*, 22 Fed. Sup. 572, in which was involved a regulation of the Treasury Department adopted under statutory authority, and wherein the court said:

"I am of the opinion that, under section 161 of the Revised Statutes, 5 U.S.C.A. Sec. 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 any officer of the department to produce a copy of it or to testify in regard thereto. *Boske* v. *Comingore*, 177 U.S. 459."

A similar rule and legislative declaration of public policy on the part of the State of California is to be found in subdivision (5) of Section 1881 of the Code of Civil Procedure, which is as follows:

"A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

The validity and propriety of this statutory declaration of public policy has been recognized by our courts in the cases of *People* v. *King*, 122 Cal. App. 50, and *Coldwell* v. *Board of Public Works*, 187 Cal. 510.

There are many English and American cases supporting this principle of privilege, although the grounds therefor are not in all cases the same and are sometimes intermingled. In some of the cases the recognition and enforcement of the rule is apparently based upon the relationship and privilege existing with regard to attorney and client, although the factual relationship is that of public prosecutor and informer; in others, upon the ground that the matters involved constitute state secrets; and in others, upon the ground of injury to the public service, interference with the administration of justice, etc.

In the United States of America there exists a dual sovereignty as between the Federal and the state governments, but it is universally recognized that the state has retained as a portion of its sovereignty its inherent police power, and has not surrendered the same to the Federal government.

It is not here, however, necessary to assert or consider conflicting sovereign rights, nor to based upon that ground the views hereinafter expressed, for it is well recognized that as a matter of comity between the Federal and state governments, in their respective fields, one should not override or encroach upon the other, save under extreme or unusual circumstances.

See: *United States* v. *Brazoria County Irr. Dist.*, 2 Fed (2d) 861.

See, also: *State ex rel Thompson* (Mo.), 4 S.W. (2d) 433.

Here we are considering the question of your duty as a public official to a subcommittee which is the representative of one of the coordinate branches of the chief law-making authority of the United States of America, and which is as a matter of comity, if for no other reason, entitled to the respect and full cooperation of all citizens and officers of the law, so far as the same can be given without violation of law or official duty.

Unquestionably in the matter of law enforcement, much information and many communications are received by law enforcement officers in the highest confidence, and the same should not be disclosed where such disclosure would hamper or impede the administration of our laws, the prosecution of crime or the preservation of the public peace. Whether or not such a disclosure with regard to a particular communication or matter of information would so result, must of necessity be left to the discretion and conscience of the public official who is the custodian of the particular evidence which it is sought to have disclosed.

This rule applies not only in pending or contemplated criminal cases or investigations, but likewise in matters of crime prevention and the preservation of the public peace.

There is to be found in the decisions some conflict as to where lies the determination as to the privileged or nonprivileged character of the documents or matters sought to be disclosed—the question of privilege, of course, being raised by the custodian thereof—, and while some of the authorities hold that this determination lies with the court, the weight of authority and the better reason for the rule indicates that the custodian is to determine upon the facts whether or not the disclosure sought would be prejudicial to the public interests.

This question is well covered in the opinion of Chief Baron Pollock in the leading English case of *Beatson v. Skene*, decided by the English Court of Exchequer in 1860 and found in 157 English Reports (Full Reprint), page 1415, wherein he said:

> "It is manifest (we think) that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State. * * * We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice; and the question then arises, how is this to be determined?
>
> It is manifest it must be determined either by the presiding Judge, or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against.
>
> It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community."

In determining the question with which you are confronted, you should weigh and balance the several public interests involved and furnish to the investigating committee all documents and information referred to in the subpoena that may be disclosed without violation of Section 1881 of the Code of Civil Procedure or your duty as a public law enforcement officer, as hereinbefore indicated.

In order to demonstrate to the investigating committee your desire to fully cooperate in every respect in which you lawfully may, and to make a record of your desire to so comply, and of your reason for a partial non-compliance with the subpoena, if such there by with regard to any documents or information sought thereby, I suggest that in response to the subpoena you prepare a formal written return in accordance with the ideas and principles hereinbefore indicated, present the same to the investigating committee upon your appearance before it, and have the same made a part of the official record.

In conclusion, I may say that in answer to the subpoena here under consideration you may well be guided in your appearance before the Committee by the language used by the Attorney General of the United States in the opinion hereinbefore referred to, when he said:

> "While I entertain no doubt that the letters and telegrams which passed between the Commissioner of Internal Revenue and the United States attorney, regard being had to their subject-matter, fairly come under the protection of the principle above adverted to, it seems to me that it would be proper for the

latter officer to appear before the court in obedience to the subpoena, and to there object to produce the papers called for on the ground that their production would be prejudicial to the public interests, if, in his judgment or in that of the Commissioner, such would be the case. It may reasonably be presumed that the court, on the objection being made, will be governed by the prevailing rule of law, according to which the production of the papers would seem not to be compellable."

I trust that the foregoing expression of principles and citation of authority will be sufficient to guide you in the full performance of your duty not only to the Committee but to the people whom you serve.

Very truly yours,

EARL WARREN
Attorney General