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Evidence -- Government Agencies -- Right to Determine Privilege of Non-Disclosure of Records

restraint of both is their own and the community's protection.[21] Thus, the same standard should logically limit their respective freedoms.[22]

It is submitted that the argument advanced by Justice Wilson fails in that even those alleged insane cannot be summarily deprived of liberty.[23] In the absence of actual violent insanity,[24] the alleged sexual psychopath should be entitled to bail. However, the bond set may be high enough to insure societal welfare and deter the recidivistic tendencies of the sex offender.[25]

EVIDENCE—GOVERNMENT AGENCIES—RIGHT TO DETERMINE PRIVILEGE OF NON-DISCLOSURE OF RECORDS

Plaintiffs, wives of civilian observers killed in the crash of an Air Force plane, sued for wrongful death under the Federal Tort Claims Act.[1] They sent written interrogatories[2] requesting copies of the accident report, but the Air Force refused to release them, claiming a privilege of non-disclosure.[3] The district judge ruled that the United States should produce the documents for his examination and allow the court to determine whether they are privileged. Upon failure to comply with this ruling the court issued an order[4] establishing the facts in plaintiffs' favor and enjoined the United States from introducing evidence to controvert them.[5] *Held*, a claim of privilege involves a justiciable question, to be determined by the court on examination of the documents *in camera*[6] and *ex parte*. *Brauner et al. v. United States*, 192 F.2d 987 (3d Cir. 1951).

21. People v. Chapman, *supra* note 10; *but see* People v. Sims, *supra* note 11.

22. See Karpman, *supra* note 16.

23. *In re* Cornell, 111 Vt. 525, 18 A.2d 304 (1941) (temporary restraint justifiable only if being at large would create danger); Reagan v. Powell, 125 Ga. Rep. 89, 53 S.E. 580 (1906) (alleged insane person entitled to bail pending appeal from sanity hearing; this right to be denied only if mental condition becomes sufficiently violent to justify summary process); Weihofen & Overholser, *Commitment of the Mentally Ill*, 24 TEX. L. REV. 307 (1946) (only five states provide by statute for arrest of alleged mental defective at time of service of notice of hearing. The general criteria is danger to self and others.).

24. In which case petitioner should be committed under the mentally ill section of the statutes. Application of Keddy, 233 P.2d at 163, 164 (Cal. 1951); Ex *parte* Westcott, 93 Cal. App. 575, 270 Pac. 247 (1928).

25. Ex *parte* Morehead, *supra* note 2 (pattern of past crimes indicated sufficient recidivistic tendency to warrant setting bail at $7,500). Thus, circuitously, the courts can prevent the release of those individuals who are dangerous without arbitrarily confining the lesser offenders.

1. 28 U.S.C. §§ 1346, 2671 *et seq.* (1946).

2. FED. R. CIV. P. 33 (allows written interrogatories to be answered by the adverse party); FED. R. CIV. P. 34 (one showing good cause can require production of documents not privileged).

3. 17 STAT. 283 (1872), 5 U.S.C. § 22 (1946) (provides that the heads of departments are to prescribe regulations for use, custody, and preservation of classified records, not inconsistent with law).

4. FED. R. CIV. P. 37(b)(2)(i)(ii) (provides for refusing evidence to contravert facts and establishes the evidence of moving party as true).

5. 10 F.R.D. 468 (E.D. Pa. 1951).

6. A hearing before the judge in his private chambers.

At common law an action would not lie against the sovereign except by express consent.[7] Under the Federal Tort Claims Act[8] the United States consented to be held liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances."[9] It was early held that the Rules of Procedure apply equally to the government and private litigants,[10] especially as to discovery before trial.[11] One limitation on discovery against the government is the common law claim of privilege against disclosure of secrets of a diplomatic or military nature.[12] Department heads by statute may also claim privilege as to departmental documents.[13] This latter "privilege" is subject to an exception where the opposing party has shown that facts necessary to his suit are exclusively within the possession of the government and public policy will not suffer by making them known.[14]

At a cursory glance it would seem that the government has consented to pre-trial discovery to the same extent as individuals.[15] However, in recent cases[16] the government has asserted that it has the exclusive right to determine this "privilege" without judicial review. The Supreme Court has admonished that a privilege "should be restricted to its narrowest bounds."[17] Nevertheless the trial judge is allowed wide discretion[18] to determine whether good cause[19] exists, and upon a showing of such will require production of the disputed records.

The government relied on two English cases[20] to support its contention that administrative heads should determine the extent of the privilege. But the British government is not one of checks and balances or separation of

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7. BL. COMM.* 261 (1753).

8. *Supra* note 1. Section 2674.

9. Interest before judgment and punitive damages are exceptions.

10. Sherwood v. United States, 112 F.2d 587 (2d Cir. 1940); Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949); Wunderly v. United States, 8 F.R.D. 356 (E.D Pa. 1948); United States v. General Motors Corp., 2 F.R.D. 528 (N.D. Ill. 1942).

11. United States v. General Motors Corp., *supra* note 10, at 530.

12. 8 WIGMORE, EVIDENCE § 2378 (3d ed. 1940).

13. See note 3 *supra*.

14. United States v. Cotton Valley Oil Operators Comm., 339 U.S. 940 (1950); Cresmer v. United States, *supra* note 10; Bank Line Ltd. v. United States, 76 F. Supp. 801 (S.D.N.Y. 1948).

15. Berger and Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451 (1950). But see O'Reilly, *Discovery Against the United States: A New Aspect of Sovereign Immunity?*, 21 N.C.L. REV. 1 (1942).

16. United States v. Cotton Valley Oil Operators Comm., *supra* note 14; Alltmont v. United States, 177 F.2d 971 (3d Cir. 1950).

17. Hickman v. Taylor, 329 U.S. 495, 506 (1947).

18. United States v. Yellow Cab Co., 340 U.S. 543 (1951); Alltmont v. United States, *supra* note 16; Evans v. United States, 10 F.R.D. 255 (W.D. La. 1950); Wunderly v. United States, *supra* note 10.

19. Whether special circumstances make it essential to the preparation of the party's case to see the documents sought.

20. Duncan v. Cammell, Laird and Co., [1942] A.C. 624 (administrative board decided it was privileged a refusal to divulge records); Lord's Comm'rs of the Admiralty v. Aberdeen Steam Trawling and Fishing Co., [1909] S.C. 335 (administrative board has discretion to rule on records).

powers as is that of the United States.[21] The court relies mainly on *United States v. Cotton Valley Oil Operators Committee*,[22] where the Supreme Court ruled that it would decide if a privilege existed and rejected the claim of the Attorney General to determine if F.B.I. records were within the privilege.

This case[23] and others recently decided[24] act to curb the mushrooming administrative power of the executive branch of the government from usurping judicial functions. This is in line with the checks and balances system under our Constitution and is in harmony with the doctrine of separation of powers.

TORTS—RIGHT OF PRIVACY UNAUTHORIZED USE OF PHOTOGRAPH

Plaintiffs, husband and wife, sued defendant publisher for the unauthorized use in its magazine of plaintiffs' photograph, taken without their consent at their place of business. The photograph's caption and an accompanying article described the photograph as typical of an unwholesome marital relationship. *Held*, the publication of the photograph and accompanying article is an invasion of the plaintiffs' right of privacy and is actionable. *Bill v. Curtis Publishing* Co., 239 P.2d 630 (Cal. 1952).

In the United States the acceptance of the invasion of the right of privacy as an independent tort was first crystallized in the nineteenth century writings of two eminent authorities.[1] Although it has been stated that the right of privacy is not subject to concrete definition,[2] it nevertheless has been defined by a number of courts[3] and legal writers,[4] as the right to be let alone,[5] or the right to live in seclusion without being subjected to unwarranted and undesired publicity[6] or the right of a person of ordinary sensibilities to be protected from mental suffering, shame or humiliation.[7] The right is essentially personal and does not survive after death in the absence of a contract.[8] The courts have held that the action

21. 192 F.2d at 997 (1951).
22. 339 U.S. 940 (1950).
23. Brauner v. United States, 192 F.2d 987 (3d Cir. 1951).
24. United States v, Cotton Valley Oil Operators Comm., *supra* note 14; Evans v. United States, *supra* note 18; Cresmer v. United States, *supra* note 10; Wunderly v. United States, *supra* note 10.

1. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
2. Gregory v. Bryan-Hunt Co., 295 Ky. 345, 174 S.W.2d 510 (1943).
3. *Cf.* Mavity v. Tyndall, 225 Ind. 360, 74 N.E.2d 914 (1947).
4. Larremore, *The Law of Privacy*, 12 COL. L. REV. 693 (1912); McClean, *The Right of Privacy*, 15 GREEN BAG 494 (1903); Pound, *Interests of Personality*, 28 HARV. L. REV. 343 (1915). But see Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932).
5. Barber v. Time, Inc., 438 Mo. 199, 159 S.W.2d 510 (1942).
6. Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942); RESTATEMENT, TORTS § 867 (1939).
7. McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945).
8. Lunceford v. Wilcox, 80 Misc. 194, 88 N.Y.S.2d 225 (City Ct. 1949).