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## DISCOVERY AGAINST THE UNITED STATES: A NEW ASPECT OF SOVEREIGN IMMUNITY?

JOHN D. O'REILLY, JR.\*

Only recently there arose for the first time in American judicial history a case which presented directly an almost unique problem of constitutional law. In the light of current developments in the scope and methods of Governmental regulation it is more than likely that the problem referred to will eventually have to be solved by legislation, and it is principally for the purpose of outlining a background for such legislation that this paper is written.

The case referred to above is that of *United States v. General Motors Corporation et al.*,<sup>1</sup> in the United States District Court for the Northern District of Illinois, Eastern Division, Civil No. 2177. The suit was instituted in October, 1940, as one of the usual proceedings in equity by the United States for the enforcement of the antitrust laws.<sup>2</sup> After a preliminary motion for a bill of particulars was denied (2 F. R. D. 346) the defendants answered, and then, pursuant to Rule 33 of the Federal Rules of Civil Procedure, served upon the United States a list of interrogatories.

It was at this stage of the proceedings that the case departed from the lines of conventional development. The United States, in addition to objecting to the interrogatories separately upon a variety of grounds, asserted that by reason of immunities and privileges inhering in and attaching to it as a sovereign it was not compellable to answer any interrogatories at all. The Government asserted its willingness to make disclosures to its adversary, as evidenced by its having voluntarily filed a stipulation of facts in the case, but contended that answers to the interrogatories filed should not be required because, (a) they were so numerous that the labor and expense of compiling answers would be excessive, (b) the interrogators could, with no greater labor and expense, obtain the information for themselves, and (c) much of the information sought was immaterial to the issues of the case. The case was submitted on briefs, and the Court, in a decision handed down in October, 1942, rejected completely the Government's contentions of its freedom from an obligation to answer interrogatories put to it in a

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<sup>1</sup> 2 F. R. D. 346 (D. C. N. D. Ill. 1942).

<sup>2</sup> 26 STAT. 209 (1937); 38 STAT. 731 (1914); 15 U. S. C. A. §§1, 18 (1939).

civil action, but sustained its other contentions as to most of the interrogatories involved.

It is not the purpose of this paper to discuss the merits of this decision or of the reasons which the Court adduced in support of it, although these will be adverted to in the course of the exposition which follows. At best the decision of a district court is a tentative resolution<sup>3\*</sup> of the state of existing law, and it may be that the need of appropriate legislation makes the decision of any court fall short of a solution of the underlying problem.

As far as the present state of the law is concerned (and that is the principal subject of this exposition) the matter may be discussed under three headings or issues: (1) Does the sovereign's immunity from suit without its consent protect the United States from the ordinary litigant's obligation to answer interrogatories? (2) Is there a common-law privilege of non-disclosure in the United States? (3) Does the statutory privilege which the United States undoubtedly enjoys extend to interrogatories in lawsuits to which it is a party?

#### I. EXISTING PRACTICE

Before entering upon a discussion of these points it may be relevant to say a word about existing practice as to discovery in civil suits to which the Government is a party. To some extent this matter is covered by informal discussions between counsel and by voluntary stipulations filed as part of the record. This practice, however, is far from uniform. The scope of the revelations made in a particular case depends upon a variety of factors, such as the presence or absence of a criminal aspect of the case, the ease or difficulty of making information available, and the "imponderable" elements attendant upon the case.

Apart from informal discussions and voluntary stipulations it has been the practice for the Government to react to interrogatories put to it in much the same way as do private litigants. Thus, there are many cases in the books in which the United States has been ordered to answer interrogatories over its objections addressed to the merits of the interrogatories (but not to its own immunities), and there are cases in which adjudications have been made upon the sufficiency of answers given by the Government.<sup>4</sup>

<sup>3\*</sup> An order overruling objections to interrogatories is not a "final judgment," and so is not subject to appeal. The stage of the proceeding as upon dismissal of the case or adjudication of contempt for refusal of the interrogatee to comply with an order (under Rule 37) requiring an answer, or after answers and final judgments on the merits upon exceptions from a ruling admitting to the answers to the interrogatories in evidence.

<sup>4</sup> See *Curtis v. United States*, 27 F. Supp. 459 (D. Mass. 1939) under Rule 31 of the Admiralty Rules; *C. J. Tower and Sons v. United States*, 71 F. (2d) 438 (C. C. P. A. 1934) under the Customs Laws; *United States v. American Solvents*

This existing practice sheds little light upon the legal question involved. It is impossible to say to what extent informal revelations and voluntary stipulations are engendered by consciousness of a legal obligation to make discovery, how far they are attributable to an instinct of "fair play," or wherein they are strategic "trading" devices in the preliminary stages of a lawsuit. Similarly inconclusive are the decided cases wherein the Government has submitted to orders to answer interrogatories. In none of them was the issue of immunity raised, and in only one of them<sup>5</sup> was the issue of Governmental privilege set up. Thus, the *General Motors* case above referred to was one of first impression, there having been no direct precedent in point.

Where no direct precedent is in existence it is the custom of the legal profession to argue from what lawyers are pleased to call "principle," which usually means the analogy of points which have been authoritatively decided. It is to "principle" that we must turn here.

## II. IMMUNITY OF THE SOVEREIGN

### (A) Bills of Discovery

The first principle to be examined for inquiry as to whether it contains an apt analogy is that of the sovereign's immunity from suit in its own courts without its consent. This examination can be divided into two parts: (1) Does the submission of interrogatories to the United States amount to bringing suit for discovery from which the United States by virtue of its sovereignty is immune? (2) Should the burdens of the discovery provisions of the Federal Rules of Civil Procedure be construed as not binding upon the United States under the doctrine of statutory interpretation that burdensome provisions of a statute do not bind the sovereign unless he is expressly mentioned?

It is a commonplace that prior to 1912 when the Federal Equity Rules, including Rule 58, were adopted, the only available method of obtaining information from an adversary was the bill of discovery. Although bills of discovery arose out of the common-law disqualification of a party to testify in a case, centuries of practice made this bill the sole means of obtaining discovery from an adversary even after the disqualification had been abrogated. The bill of discovery took various forms. Thus, a party to an action at law could bring a collateral bill in equity against his adversary in order to obtain information to be used as evidence in the action. A plaintiff in equity could insert interrogatories in his bill, and a defendant in equity could obtain in-

and Chemical Corporation of California, 2 Fed. Rules Service 339 (D. Del. 1939) (a suit to recover alcohol taxes).

<sup>5</sup> *Fleming v. Bernardi*, 1 F. R. D. 624, 4 Fed. Rules Service 514 (N. D. Ohio 1941).

formation from the plaintiff by means of a cross-bill for discovery, but in no event could a party obtain discovery without becoming a plaintiff nor could discovery be obtained from the adverse party without making him a defendant.<sup>6</sup>

It is, of course, elementary that the United States cannot without its express consent be made a defendant in any case.<sup>7</sup> Thus, if the submission of interrogatories to the United States has the effect of making it a defendant in a suit for discovery the interrogatories will not lie.

The question may be boiled down to one of whether the discovery provisions of the Rules of Civil Procedure effect merely changes in practice and procedure, or effect changes in the form of obtaining an ancient remedy.

The Supreme Court has been reluctant to construe the Rules of Civil Procedure in a way which would enlarge the scope of judicial relief against the United States. In *United States v. Sherwood*,<sup>8</sup> a judgment creditor of a contractor who had contracted with the United States sued the United States in the District Court under the Tucker Act.<sup>9</sup> The theory of the plaintiff was that since Rule 17(b)<sup>10</sup> provides that the capacity of an individual to sue shall be determined by the law of his domicil, and the plaintiff was domiciled in New York, the law of which state provided that a judgment creditor might sue a person indebted to the judgment debtor, and since the United States was indebted to the judgment debtor, the plaintiff was entitled to sue the United States. The action was dismissed for want of jurisdiction, and the Court used the following language:<sup>11</sup>

"We think that nothing in the new Rules of Civil Practice, so far as they may be applicable in suits brought in the district courts under the Tucker Act, authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction, and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C., 723b authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

This language is indicative of a disposition not to enlarge by reason of the Rules of Civil Procedure the traditional limits of discovery against the United States.

<sup>6</sup> STORY, EQ. PL. (10th ed. 1892) §§35, 311, 390.

<sup>7</sup> *Kansas v. United States*, 204 U. S. 331, 27 S. Ct. 388, 51 L. ed. 510 (1907).

<sup>8</sup> 312 U. S. 584, 27 S. Ct. 388, 85 L. ed. 1058 (1941).

<sup>9</sup> 44 STAT. 121, 125 (1926), 28 U. S. C. A. §41 (20) (1927).

<sup>10</sup> Federal Rules of Civil Procedure, Rule 17(b).

<sup>11</sup> 312 U. S. 584, 589, 61 S. Ct. 767, 771, 85 L. ed. 1058, 1062 (1941).

Historically, as they have been used in the United States, beginning with their introduction in Massachusetts<sup>12</sup> where they were introduced by reason of absence of equity jurisdiction in the courts, interrogatories have been characterized as a "cheap bill of discovery."<sup>13</sup> This sort of description of the phenomenon points to the conclusion that the device of "interrogatories" differs only in form, but not in substance, from the traditional bill of discovery. This conclusion is strengthened by further analysis of the Rules of Civil Procedure. The methods there provided<sup>14</sup> for enforcing the requirements that interrogatories be answered preserve all of the elements of a separate bill in equity. Motion to compel answers must be filed and served. Answer to the motion is had, followed by hearing and order, sanctioned by adjudication of contempt or decree of dismissal, etc.

The only consent which the Congress has made to discovery against the United States is that expressed in Section 164 of the Judicial Code,<sup>15</sup> which provides for "calls for information" from the departments of the Government by the Court of Claims. In *Robinson v. United States*,<sup>16</sup> where this statute was critically examined, the Court of Claims held that the procedure under the statute is "more analogous to the bill of discovery as used in chancery than it is to the use of *subpoena duces tecum*."<sup>17</sup> It is arguable that since Congress has expressly consented to one form of discovery against the United States the inference should be that all other forms of discovery in all other courts are not consented to.

In Great Britain, under the procedure by which interrogatories have been substituted for bills of discovery, the courts have held that the Crown, by virtue of its immunity from suit, is not subject to interrogatories even in cases where the general immunity from suit has been waived. Thus, in *Thomas v. Regina*<sup>18</sup> the Court disallowed a motion for discovery of material documents in the possession of the Government by the plaintiff in a petition of right. In the course of the argument Chief Justice Cockburn stated:

"If it had been intended to extend Section 50 of the Common Law Procedure Act, 1854, as to discovery of documents, to the case of petitions of right, there would have been inserted some enactment saying that an officer should answer as in the case of bodies corporate."

Some time later, in *Tomline v. Regina*,<sup>19</sup> an attack was made upon the *Thomas* case. There Bramwell, L. J., answered:

<sup>12</sup> MASS. STAT. (1851) c. 233, §98; MASS. G. L., c. 231, §61.

<sup>13</sup> *Wilson v. Webber*, 2 Gray (Mass.) 558, 561 (1854).

<sup>14</sup> Federal Rules of Civil Procedure, Rule 37.

<sup>15</sup> 36 STAT. 1140 (1911), 28 U. S. C. A. 272 (1927).

<sup>16</sup> 50 Ct. Cl. 159 (1915).

<sup>17</sup> 50 Ct. Cl. 167 (1915).

<sup>18</sup> L. R. 10 Q. B. 44 (1874).

<sup>19</sup> L. R. 4 Ex. Div. 252 (1879).

"I will assume that technical reasons exist which prevent a suppliant from obtaining discovery. . . . If technical difficulties do exist in the way of obtaining discovery from the Crown, probably the legislature has intentionally left those difficulties in existence in order that it may be in the discretion of the Crown whether it will afford the information sought for by a suppliant."

In the *General Motors* case the Court agreed that the United States could not be compelled to make discovery in an action brought for that purpose. The Court stated, however: "But that is far from saying that the Government in bringing a civil action against an individual may not be subjected to the ordinary rules governing procedure in the Court in which suit is brought." To the extent that this language suggests that the United States waives its immunities by vountarily instituting legal proceedings it is clearly not good law. No point is better settled than that the sovereign immunity from suit can be waived only by act of Congress and not by act of any executive officer.<sup>20</sup> What the Court probably had in mind was the analogy of counterclaims in recoupment which may be asserted against the United States in actions brought by it. It is clear, as exemplified by *Bull v. United States*,<sup>21</sup> cited by the Court in the *General Motors* opinion, that a claim for money wrongfully withheld by the Government may be used by way of recoupment and credit in an action by the United States arising out of the same transaction, even though the defendant would have no standing to institute an original proceeding against the United States, and even though he may not by cross-claim recover a sum in excess of that owing by him to the Government. It is doubtful if this analogy supports the Court's conclusion. Rule 13(d) of the Rules of Civil Procedure expressly provides that, "These rules shall not be construed to enlarge upon the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agent thereof." The limits fixed by cases such as the *Bull* case are that a private party may set off his own money claims against money claims prosecuted by the Government.<sup>22</sup> There is no authority for the proposition that any other form of relief may be had by a private individual in a suit brought against him by the United States.

In one case<sup>23</sup> the Court required a Governmental agency to respond

<sup>20</sup> *Stanley v. Schwalby*, 162 U. S. 255, 270, 16 S. Ct. 754, 4 L. ed. 959, 965 (1896); *Minnesota v. United States*, 305 U. S. 382, 388, 59 S. Ct. 292, 295, 83 L. ed. 235, 241 (1939); *United States v. Shaw*, 309 U. S. 495, 60 S. Ct. 659, 666, 84 L. ed. 888, 891 (1940).

<sup>21</sup> 295 U. S. 247, 261, 55 S. Ct. 695, 700, 79 L. ed. 1421, 1428 (1935).

<sup>22</sup> See *United States v. United States Fidelity and Guaranty Company*, 309 U. S. 506, 514, 60 S. Ct. 653, 657, 83 L. ed. 894, 899 (1940); and cases cited *supra* note 20.

<sup>23</sup> *Fleming v. Bernardi*, 1 F. R. D. 624, 4 Fed. Rules Service 514 (N. D. Ohio 1941).

to interrogatories addressed to it by the defendant. This was a suit brought by the Administrator of the Wages and Hours Division to exact compliance with the Fair Labor Standards Act. The case is not a direct precedent upon the issue here under discussion, since the suit there was in the name of an officer of the United States, rather than of the United States itself, and it is a familiar doctrine that the rules with respect to sovereign immunity, which attach to the sovereign itself, are not always available to the officers of the sovereign.<sup>24</sup>

### (B) Interpretation of the Rules

An alternative topic of the issue of immunity is the matter of interpretation of the discovery provisions of the Rules of Civil Procedure. A basic maxim of public law has been that,

"The King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised ('any person or persons, bodies politic or corporate, etc.') affect him not in the least if they may tend to restrain or diminish any of his rights or interests."<sup>25</sup>

While this maxim has not been and should not be applied as a mere mechanical formula,<sup>26</sup> it is highly significant that the United States is not expressly described in Rule 33, or in any of the other rules pertaining to discovery, as a "party" who may be required to answer interrogatories. This omission takes on added significance in the light of the fact that other provisions of the Rules of Civil Procedure make express and sometimes exceptional provision for the United States in other matters.<sup>27\*</sup>

In the *General Motors* case the Court drew the inference from the phrasing of Rule 37 that it must have been the intention of the framers

<sup>24</sup> *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738, 6 L. ed. 204 (1824); *United States v. Lee*, 106 U. S. 196, 15 S. Ct. 240, 27 L. ed. 171 (1882); cf. *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. ed. 714 (1908).

<sup>25</sup> 1 BL. COMM. 261, citing the *Magdalen College Case*, 11 Co. Rep. (Eng.) at 74. Quoted as applicable to the United States as a sovereign; *Dollar Savings Bank v. United States*, 19 Wall. (U. S.) 227, 229, 22 L. ed. 80 (1873).

<sup>26</sup> Compare *United States v. Cooper Corporation*, 312 U. S. 600, 61 S. Ct. 742, 85 L. ed. 1071 (1941) with *Georgia v. Evans*, 316 U. S. 159, 62 S. Ct. 972, 86 L. ed. (Adv. Ops.) 926 (1942); see also *Nardone v. United States*, 302 U. S. 379, 58 S. Ct. 275, 82 L. ed. 314 (1937); *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 55 S. Ct. 50, 79 L. ed. 211 (1934); *United States v. Fox*, 94 U. S. 315, 321, 24 L. ed. 192, 193 (1876).

<sup>27\*</sup> The following rules make special provision for cases in which the United States is a party: Rule 4(4) and (5) relating to service; Rule 12(a) relating to answers and actions and cross-claims; Rule 17(a) relating to actions for use and benefit; Rule 25(d) relating to suits in case of death of officers of the United States; Rule 37(f) relating to expenses and attorney's fees; Rule 39(c) relating to jury trial when jury trial is required; Rule 54(d) relating to certain costs; Rule 55(e) relating to judgment by default; Rule 62(e) relating to security on appeal; Rule 65(c) relating to security on restraining orders.



of the Rules to subject the United States to the provisions of Rule 33 and the other rules respecting discovery.

Rule 37 establishes a procedure to compel answers when a party upon whom interrogatories have been served refuses to answer. The Rule provides among other things that the Court may award expenses and attorney's fees against the losing party in such procedure, and it goes on to provide, "(f) Expenses and attorney's fees are not to be imposed upon the United States under this Rule." In its opinion the Court argued that, "If Rule 33 is not applicable to the United States, sub-paragraph (f) would have been omitted or it would have been expressly stated that the United States was not subject to Rule 33." The argument overlooks the fact that under Rule 37 expenses and attorney's fees may be awarded not only (1) against the interrogatee against whom an order requiring an answer has been entered, but also (2) against an interrogator who is unsuccessful in his attempt to obtain an order requiring the adverse party to answer. It is at least open to debate that sub-paragraph (f) was inserted to relieve the Government from the burden of expenses and attorney's fees in the latter type of case, and such a construction does not necessarily carry the connotation that the Government stands in need of relief in the former type of case.

The evidence of contemporary history at the time of the drafting of the Rules indicates that if the framers of the Rules had any specific intent in this matter it was that the United States should, like any other litigant, be required to make discovery pursuant to the provisions of the Rules. Two prominent members of the committee which drafted the Rules for the Supreme Court have expressly stated that this was their interpretation.

At the Washington Institute on the Federal Rules Dean (as he then was) Charles E. Clark, in response to a question from the floor, stated:<sup>28</sup>

"In this connection I might say that one of the series of questions that have been given to me on behalf of the Department of Justice raises what might be termed a general issue: How far the United States Government is exempt from certain provisions of these rules or subject to special rules. Now from time to time in these rules where we have felt it necessary we have provided for special rules as to the Government. A notable case is in the time for answer, which in Rule 12(a) is generally twenty days, but for the Government is, as you know, sixty days. I believe the lawyers for the Government thought that that was all too short a time for them to find out what the Government was doing. At any rate we continue the existing law.

"Now let me say as to the general question, it was our theory that except as we made special provisions these rules apply to the United States as a litigant as much as to anyone else. We believe that is a

<sup>28</sup> AMERICAN BAR ASSOCIATION; PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D. C., 49.

sound principle and we hope it works out. Of course, as I trust you all realize, after these rules went out of our hands we could not say what would happen to them or how they would be read. I expect that we may shudder sometimes to see what has happened to a particular rule, and in this case I can't presume to say what the courts may do, but it seems to us sound that the United States should follow these general rules."

And in the New York Symposium on the Federal Rules, former Attorney General William D. Mitchell spoke to similar effect.<sup>29</sup>

These statements of opinion are not "contemporary statements of the framers" in the sense that they were made before or during the drafting of the Rules, and there is no showing that either the other members of the committee or the Supreme Court had this interpretation of the Rules in mind. The two speakers, however, are such eminent authorities in their own right that their opinions with respect to the proper interpretation of the Rules, even though not fully considered, should not be lightly dismissed.

It was suggested by the Court in the *General Motors* case that if the Rules of Civil Procedure do not apply to the United States "there would be no rule in such cases as to many matters of procedure." A distinction should be taken between the applicability of the Rules in general to cases in which the United States is a party and the applicability of rules which would subject the United States to extraordinary burdens. Thus, there can be no question but that the United States like any other litigant is bound, as a condition of obtaining judicial relief, to file a complaint which conforms to the standards of adequacy of pleadings set up under the Rules. But to the extent that a rule, under the form of a change of procedure, would in fact add to the substantive liability of the Government, it should be held to be inapplicable to the Government. In this way a distinction may be perceived between Rule 12, under which a defendant may call for a bill of particulars, and Rule 33, under which a party may submit interrogatories. To the extent that a bill of particulars is an amplification of the pleadings in a case the Government, like any other litigant, may be required to prepare such a bill. Interrogatories, on the other hand, call for matters collateral to the pleadings, and to the extent that they perform the function traditionally performed by a bill of discovery, the Government should be excused from making answer.

### III. COMMON-LAW PRIVILEGE

The second point involved in a discussion of this problem is that of common-law privilege. This privilege may be of two kinds. First,

<sup>29</sup> AMERICAN BAR ASSOCIATION; PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D. C., 333.

there is the familiar privilege of the Government against disclosure of "State secrets," and then there is the perhaps less familiar privilege respecting the disclosure of information acquired by the Government with respect to violations of law, particularly of criminal law.

There is no need here of extended discussion of the first type of privilege. While the area covered by the term "State secret" is somewhat indefinite the principles underlying the privilege have been well understood since the date of *Marbury v. Madison*.<sup>30</sup>

When either type of common-law privilege exists, it grows out of the character of the information in the possession of the Government, and is not personal to the Government or the officer within whose control the information lies. This should be abundantly clear from a line of decisions in the various Circuit Courts of Appeals involving interrogatories to members of the National Labor Relations Board, respecting the methods by which decisions of the Board were arrived at.<sup>31</sup> By the weight of authority<sup>32</sup> interrogatories of this sort are improper and need not be answered. None of the cases, however, can stand as authority for a general immunity of the Board of its members from interrogation. In some of the cases<sup>33</sup> the rather questionable assumption was made that a Court of Equity has inherent power to issue interrogatories and does not need a statute or rule from which to draw such jurisdiction, but this question need not be gone into here. Once it is conceded that a given court has general jurisdiction to issue interrogatories and that it has jurisdiction of an action to which a Governmental officer or agency is a party, the power to issue interrogatories may be exercised against such officer or agency.<sup>34</sup> Before the interrogatories need be answered, however, decision will be required as to their propriety; that is to say, it must be decided not only whether the interrogatories are relevant, but also as to whether they intrude upon a Governmental privilege or derogate from the independence of a non-judicial branch of the Government.

The Governmental privilege of principal concern here is that of withholding information which has been disclosed to the Government respecting violations of law. It is considered to be the civic duty of

<sup>30</sup> 1 Cranch (U. S.) 137, 2 L. ed. 60 (1803).

<sup>31</sup> *Cupples Co. v. N. L. R. B.*, 103 F. (2d) 953 (C. C. A. 8th, 1939); *N. L. R. B. v. Cherry Cotton Mills*, 98 F. (2d) 444, 98 F. (2d) 1021 (C. C. A. 5th, 1938); *Inland Steel Co. v. N. L. R. B.*, 105 F. (2d) 246 (C. C. A. 7th, 1939); *N. L. R. B. v. Botany Worsted Mills*, 106 F. (2d) 263 (C. C. A. 3rd, 1939).

<sup>32</sup> See *United States v. Morgan*, 313 U. S. 409, 421, 61 S. Ct. 999, 1004, 85 L. ed. 1429, 1435 (1941).

<sup>33</sup> See *N. L. R. B. v. Cherry Cotton Mills*, 98 F. (2d) 444, 98 F. (2d) 1021 (C. C. A. 5th, 1938).

<sup>34</sup> Compare *Morgan v. United States*, 298 U. S. 468, 56 S. Ct. 906, 80 L. ed. 1288 (1936); 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129 (1938) with *United States v. Morgan*, 313 U. S. 409, 61 S. Ct. 999, 85 L. ed. 1429 (1941).

every citizen to inform his Government of violations of law of which he has knowledge, and, in order to encourage the performance of this duty, the Government is privileged to withhold from disclosure both the identity of the informer and the fact and details of the information which he has given. It has been uniformly held that Government officers cannot be required, even by court order, to disclose the name of an informer or the content of any communications he had made to the Government.<sup>35</sup> It has even been held that a defendant in a criminal case is not entitled to impeach a witness against him by showing that the witness was an informer.<sup>36</sup> In one circuit it has been suggested that there is a limitation upon this doctrine, namely, that in a criminal case if the information in the hands of the Government is "useful evidence to vindicate the innocence of the accused, or lessen the risk of false testimony, or is essential to the proper disposition of the case disclosure will be compelled."<sup>37</sup>

Since most of the information in the hands of any Governmental officer or agency will have been obtained in the course of law enforcement activities and is, therefore, with respect to actual or potential violations of law, it would seem that a strict application of the doctrine of privilege would render the Government practically immune from almost any interrogatory that might be put to it.

#### IV. PRIVILEGE UNDER REVISED STATUTES §161

The third point for discussion, the extent of the Government's statutory privilege is in a sense supplementary to the second point just mentioned. The source of this privilege is Section 161 of the Revised Statutes<sup>38</sup> which provides:

"The head of each department is authorized to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it."

Pursuant to the authority granted by this section the heads of the various departments have issued orders and regulations, of which Order No. 3229 of the Department of Justice is typical.<sup>39\*</sup>

<sup>35</sup> The classic case is *Worthington v. Scribner*, 109 Mass. 487 (1872) (per Gray, J.). Followed in *Vogel v. Gruaz*, 110 U. S. 311, 4 S. Ct. 12, 28 L. ed. 158 (1884), and in *In re Quarles and Butler*, 158 U. S. 532, 15 S. Ct. 959, 39 L. ed. 1080 (1895) (per Gray, J.).

<sup>36</sup> *Arnstein v. United States*, 296 Fed. 946 (App. D. C., 1924).

<sup>37</sup> *Wilson v. United States*, 59 F. (2d) 390 (C. C. A. 3rd, 1932).

<sup>38</sup> R. S. §161, 5 U. S. C. A. §22 (1927).

<sup>39\*</sup> "Pursuant to the authority vested in me by R. S. §161 (U. S. Code, Title 5, §22), it is hereby ordered:

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of the United States Attorneys,

Regulations made under R. S. §161 have been before the courts on several occasions. It has been held that the statutory phrase "not inconsistent with law" means simply that such regulations may not have the effect of repealing statutes.<sup>40</sup> Regulations are "consistent with law" which modify the normal duty to respond to subpoena, and presumably other processes of the courts. Thus, in *Ex Parte Sackett*,<sup>41</sup> an agent of the Federal Bureau of Investigation, who had collected some evidence with a view to its use in an antitrust proceeding, was committed for contempt of court upon his refusal to honor a subpoena issued in the course of a private litigation calling upon him to produce the material which he had collected. The Circuit Court of Appeals ordered his release under a writ of habeas corpus, holding that the statute and an order of the Attorney General issued thereunder controlled the conduct of the agent and justified his refusal to honor the subpoena.

Thanks to the loose phrasing of an opinion<sup>42</sup> of Attorney General (later Mr. Justice) Moody a distinction has been made and was followed by the Court in the *General Motors* case. There the Court said, "As to the order of the Attorney General it has been the opinion of some of his predecessors in office that the order applied only when the Government was asked for the information in suits between private parties. [Citations.] And Moore in his work on Federal Practice, Vol. 3, pages 2641, 2642, inclines to the opinion that the prohibition relates to cases between private parties and that, unless against public policy in the particular case, a Court should require disclosure in an action in which the United States is a party."

The color for this view is derived from the opinion of Attorney General Moody to the Secretary of Commerce and Labor,<sup>43</sup> where it

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Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation."

<sup>40</sup> *Boske v. Comingore*, 177 U. S. 459, 20 S. Ct. 701, 44 L. ed. 846 (1900).

<sup>41</sup> 74 F. (2d) 922 (C. C. A. 9th, 1935). See also *In re Valencia Condensed Milk Company*, 240 Fed. 310 (C. C. A. 7th, 1917); *Harwood v. McMurdy*, 22 F. Supp. 572 (W. D. Ky. 1938).

<sup>42</sup> Opinion to the Secretary of Commerce and Labor, January 9, 1905, 25 Or. A. G. 326.

<sup>43</sup> See note 42 *supra*.

was stated that the Secretary need not produce certain documents in a suit between private parties. That this language was not intended as expressive of a limitation upon the doctrine of privilege is manifest from the Attorney General's citation with approval<sup>44</sup> of an opinion<sup>45</sup> of one of his predecessors (Devens), where it was ruled that the confidential character of certain intra-departmental communications was a ground for refusing their production in a suit to which the United States was a party, viz., an action on distillers' bonds for collection of taxes. Apart from these sources there is no authoritative ground for restricting the application of R. S. §161 to cases in which the United States is not a party. The statute itself is a broad and general grant of authority to the heads of departments to make regulations concerning the papers, records, and other property of the departments in all matters, not merely in the matter of responding to discovery processes of the courts.

#### V. CONCLUSIONS

Tested in the light of these premises, the existing law is at one or the other of two equally undesirable extremes. Either, as what seems to the writer the more likely, the Government is ensconced behind an impregnable wall of immunity and privilege, or, as it seemed to the court which decided the *General Motors* case, it stands upon the same level as the ordinary private litigant except as to matters involving affairs of state. The ideal is probably somewhere between the two.

In most cases when the Government appears as a party in the courts its stature is not reduced to that of a private party seeking relief. Its appearance is the means of setting in motion the judicial processes for translating the mandates of the statutes into action. It is the *parens patriae* vindicating a public right, rather than an individual seeking a private remedy. Its rights and immunities viewed in this light cannot be measured by the same standard which determines the rights of individuals.

On the other hand, unnecessary insistence upon unlimited privileges for a "favored suitor" might be "an unjust and tyrannical exercise of power." A Government whose rights are without measure is worse than one whose rights are no greater than those of its citizens.

One practical suggestion, although entirely without warrant from the existing legal materials, was advanced in a district court opinion which was subsequently withdrawn and which has not been replaced, at least for publication.<sup>46</sup> It was there suggested that the Government

<sup>44</sup> Opinion to the Secretary of Commerce and Labor, January 9, 1905, 25 Op. A. G. 328.

<sup>45</sup> Opinion to the Secretary of the Treasury, May 31, 1878, 16 Op. A. G. 24.

<sup>46</sup> *Standard X-Ray Company, Inc. v. United States*, 3 Fed. Rules Service 393 (N. D. Ill. 1940).

is subject to a duty of full discovery in a litigation arising out of breach of a proprietary contract to which it is a party.<sup>47\*</sup>

Of course, the distinction between "sovereign" and "proprietary" activities has been observed for many years with all too many sad results in the law of municipal corporations. Care in draftsmanship could save legislation which adopts some such distinction from most of the dread consequences of a "tyranny of labels."

Perhaps, too, it is time to review and re-write the common-law privilege concerning the acts of the informers. The benefits accruing to governments from altruistic performances of civic duty to tell of violations of law are negligible. Most citizens will tell their Government what they know—but only after the Government learns that they have knowledge and puts direct questions to them. A happy medium can undoubtedly be achieved between paralyzing law enforcement by requiring premature disclosure of evidence and information in the hands of the prosecuting officers, and the alternative of leaving the information of the private litigant to the absolute discretion of an executive officer.

Along with modifications there should also be extensions of the rules of privilege and immunity. While the doctrine of sovereign immunity is applicable only to litigation carried on in the name of the United States, and the privilege under R. S. §161 extends only to the great departments of the Government, the enforcement of particular laws is being increasingly entrusted to administrative officers and agencies who frequently conduct civil litigation in their own names. To the extent that such litigation has the function of enforcing important public rights these agencies should be given substantially the same status enjoyed by a litigating Government itself.

Probably no statute can be written which will lay down, in meticulous detail, the precise extent to which discovery should be available in every case to which the Government is a party. Any rule devised will be subject to construction, interpretation and application by the courts. The important thing, now that the question has been opened up, is to consider and decide upon a solution based upon the realities of the

<sup>47\*</sup> Strictly speaking there is no such a thing as a "proprietary" function of the United States. Any acts of that Government within the limits of its constitutional powers are necessarily "Governmental" or "sovereign" acts. *Federal Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U. S. 95, 102, 62 S. Ct. 1, 86 L. ed. 46 (1941). But so far as the propriety of invoking immunity and privilege is concerned there is a vast difference between, on the one hand, a suit under the Tucker Act to determine whether penalties for late performance should be visited upon a contractor or upon a sub-contractor, or a suit in admiralty involving the commission of a maritime tort by a vessel of the United States, and, on the other hand, a proceeding in equity to dissolve an unlawful combination in restraint of trade or a proceeding to exact compliance with an order of the National Labor Relations Board.

problem, rather than upon legalistic abstractions. Existing legal rules, the only materials upon which the courts can rely, are inadequate for a full solution. The problem calls for the creation of new rules, and it is devoutly to be wished that these will be forthcoming before the question is raised in too many cases in which too many judges will attempt to adapt the common law of the situation to their own notions of the right and justice of the matter.