NOTES

CONCEALMENT OF AN INFORMANT'S IDENTITY—A GOVERNMENTAL PRIVILEGE

Historically, the inducement of an informant to convey his information finds roots in the practice of approvement, in which a person charged with a felony would confess his guilt and then offer to name other criminals. Should the others be convicted, the informant would be pardoned.[1] Another practice designed to encourage the informant was the English statutory precedent to the modern qui tam action[2] which gave an informant the right to participate in the proceeds of any penalty imposed.[3] The English law early recognized the government's privilege of non-disclosure of its informants as essential to any effective use of informants in law enforcement.[4] That this privilege exists in America is evidenced by a plethora of case authority.[5]

It is clear that government has *some* privilege to withhold the identity of its informants. This privilege is, in substance, that government officials will not be compelled to disclose the identity of an inform-

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1. Cf. Whiskey Cases, 99 U.S. 594 (1878); Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938).

See II Pollack & Maitland, History of English Law 631 (1895). See also Donnelly, Judicial Control Of Informants, Spies, Stool Pigeons, And Agent Provocateurs, 60 Yale L.J. 1091 (1951).

2. United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943). Cf. 38 Stat. 277 (1914), 21 U.S.C. § 183 (1952) (narcotics).

3. Holdsworth, History of English Law 355-58 (2d ed. 1937). See Donnelly, supra note 1.

4. See the statement of Eyre, C.J., in Hardy's Case, 24 How. St. Tr. 808 (1794) that: "[T]here is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed. . . ."

5. In re Quarles and Butler, 158 U.S. 532 (1895); United States v. Conforti, 200 F.2d 365 (7th Cir. 1952), cert. denied, 345 U.S. 925 (1953); United States v. Li Fat Tong, 152 F.2d 650 (2d. Cir. 1945); Shore v. United States, 49 F.2d 519 (D.C. Cir. 1931); Goetz v. United States, 39 F.2d 903 (5th Cir. 1930); Segurola v. United States, 16 F.2d 563 (1st Cir. 1926); Smith v. United States, 9 F.2d 386 (9th Cir. 1925); Tobin v. Gibe, 13 F.R.D. 16 (1952); People v. Alaniz, 149 Cal. App. 2d 560, 309 P.2d 71 (1957); Anderson v. State, 72 Ga. App. 487, 34 S.E.2d 110 (1945); Brewster v. Commonwealth, 278 S.W.2d 63 (Ky. 1955); State v. Soper, 16 Me. 293 (1839); Perry v. State, 150 Miss. 293, 116 So. 430 (1928); State v. Bailey, 320 Mo. 271, 8 S.W.2d 57 (1928); Sadler v. State, 118 Tex. Crim. 318, 40 S.W.2d 91 (1931).

ant unless it appears essential to the proper disposition of justice.[6] The privilege is one belonging to the government, i.e., invocable by government officials who are called upon as witnesses to disclose the source of their information.[7] Whether disclosure will be compelled is dependent on balancing the public interest in protecting the flow of information against the individual's right to prepare his case.[8] The basic rights of an accused to a fair trial or of a party litigant to a broad scope of discovery may well preclude any valid claim of the privilege in a particular instance. Therefore, although there is some authority holding that this is an absolute privilege to be determined by the government,[9] it would seem that allowance of the privilege in any particular instance is a matter reasonably left to judicial discretion.[10] The purpose of this note is to indicate the exceptions and limitations of the privilege, in this way setting forth the basic nature of the privilege as it exists today.

If an informant conveyed to the police information indicating that *X* was engaged in illegal drug traffic, and if the police acting on this "lead" or "stimulus" observed such activity, i.e., the sale of drugs, then at trial the accused could not demand disclosure of the informant's identity.[11] The informant's information was not used as evidence in the trial, and the informant, therefore, could in no way be characterized as a witness against the accused. Thus, the accused could not assert that there was any infringement upon his right to confrontation.[12] Neither, in this situation, could he claim that his

6. Scher v. United States, 305 U.S. 251 (1938); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); United States v. Bortlik, 119 F. Supp. 425 (M.D. Pa. 1954).

7. In re Quarles and Butler, 158 U.S. 532 (1895); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); State v. Hoben, 36 Utah 186, 102 Pac. 1000 (1909). See Underhill, Criminal Evidence § 287 (3d ed. 1923).

8. Roviaro v. United States, 353 U.S. 53 (1957).

9. Worthington v. Scribner, 109 Mass. 487 (1872) (the question of how far and under what circumstances the names of informers and the channels of communication shall be known is in the absolute discretion of the government); Marks v. Beyfus, L.R. 25 Q.B.D. 494 (1890) (the privilege is a rule of law which must be applied as such by the trial judge).

10. In Boudin v. Dulles, 136 F. Supp. 218 (D.C.D.C. 1955), aff'd on other grounds, 235 F.2d 532 (D.C. Cir. 1956), the court states at 222, that:

"When the basis of action by any branch of the government remains hidden from scrutiny and beyond practical review, the seeds of arbitrary and irresponsible government are sown. More and more the courts have become aware of the irreparable damage which may be . . . wrought by the secret informer and faceless talebearer whose identity and testimony remains locked in confidential files."

11. See, e.g., Shore v. United States, 49 F.2d 519 (D.C. Cir. 1931) (holding that where the informant furnished only an "impulse" the defendant cannot demand disclosure).

12. Kwock Jan Fat v. White, 253 U.S. 454 (1920); Dear Check Quong, 160

basic right to a fair trial was violated, and hence there could be no effective plea of lack of due process. The labels courts use to characterize these and similar situations are "lead" and "stimulus," and it is clear that they are only labels. They are names attached to situations in which the evidence of the case, the proof in trial, does not consist of the informant's communications, and hence there is no violation of the accused's rights to confrontation or to a fair trial.

It is in this light that one may well draw an analogy between the right to confrontation and the hearsay rule of exclusion prohibiting the introduction into court of statements made out of court by one other than a witness. Both are founded upon similar considerations, i.e., that a litigant should be able to cross-examine witnesses presented against him, and incidentally that the court should be able to observe the manner and demeanor of witnesses whose testimony is to be used as evidence.[13] Where evidence is admitted under one of the many exceptions to the hearsay rule there is a concomitant denial of the opposing party's right to confrontation. Similarly, where the governmental privilege of non-disclosure is afforded, the defendant's right to confrontation is denied. The exceptions to the hearsay rule are based on necessity and probability of trustworthiness.[14] It has been specifically held that the constitutional right of confrontation does not preclude the admission of evidence under an exception to the hearsay rule.[15] By analogy it is submitted that necessity is also a primary factor in granting the government its privilege of non-disclosure. Often the government's overriding interest in the protection of its channels of information satisfies this element of necessity. There are, however, situations in which the accused's right to a fair trial, or his right to confrontation, or both, would be violated if the government were allowed to invoke its privilege of non-disclosure.

Let us assume that an informant went with a government agent to aid in his purchasing of illegal, non-taxed, liquor. The informant was known to the offender and it was through his introduction that the agent was able to consummate the purchase. At trial the agent testified as to his purchase, but refused to divulge the name of his aid.[16] In such a situation the state has in no way used the informant as a witness against the accused. Thus, it would seem that there could be no successful argument for disclosure, if grounded solely on the

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F.2d 251 (D.C. Cir. 1947); People v. Dewson, 150 Cal. App. 2d 119, 310 P.2d 162 (1957).

13. 5 Wigmore, Evidence §§ 1364-65, 1397 (3d ed. 1940).

14. 5 id. § 1420.

15. United States v. Leathers, 135 F.2d 507, 511 (2d Cir. 1943).

16. This situation was taken, though slightly modified, from the case of Crosby v. State, 90 Ga. App. 63, 82 S.E.2d 38 (1954).

basis of a denial of confrontation. Still, it should be evident that the informant has done more than to merely provide a "lead."[17] He is, in fact, a material witness to the alleged crime, and may often be the only such witness. As such, it seems clear that the accused should be given the right to inquire of him, and if desired have him called as a witness. To hold to the contrary would be to deprive the accused of a material witness, thus denying his right to a fair trial.[18] In this and similar situations courts often say that the informant was in truth not just an informant, but rather a "decoy."[19] Again, such is merely a label that courts use to apply to situations in which they will compel disclosure. It is a situation which lies midway between those in which the informant has merely provided a "lead" and those in which he has supplied a part of the state's proof of the case.

Let us assume that an informant was searched by a government agent and found free of narcotics. After establishing this fact the agent gave the informant marked money with which he was to attempt to purchase illegal drugs. The informant did in fact buy the drugs, and after such purchase he was again searched by the agent, the drugs being taken for evidence and, at the same time, the seller being arrested. At trial, the agent testified in full detail as to the above facts which composed the major portion of the state's case, but refused to disclose the name of the informant. In this and similar situations courts are likely to say that the informant was not merely an informant, but rather a "participant," and hence disclosure should be compelled.[20] The state's evidence consisted so largely of what the informant did, that he in essence was being used as a witness against the accused, without giving the accused the right to be faced by or to cross-examine him. Further, the informant was both a material witness to the offense and a material element in its commission.[21] Hence to deny the accused the identity of the informant is to deny him his basic right to a fair trial. It has been held that such a denial is a violation of due process of the law.[22] These factors, the rights of confron-

17. See text supported by notes 11-12, supra.

18. Crosby v. State, 90 Ga. App. 63, 82 S.E.2d 38 (1954).

19. Id. at 64-65, 82 S.E.2d at 39.

20. See, e.g., People v. Lawrence, 149 Cal. App. 2d 435, 308 P.2d 821 (1957).

21. Ibid.

22. Roviaro v. United States, 353 U.S. 53 (1957); Gilmore v. United States, 256 F.2d 565 (5th Cir. 1958); United States v. Conforti, 200 F.2d 365 (7th Cir. 1952), cert. denied, 345 U.S. 925 (1952); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950); People v. McShann, 330 P.2d 33 (Cal. 1958); People v. Alvarez, 154 Cal. App. 2d 692, 316 P.2d 1006 (1957) (when an informant takes part in the criminal act he is no longer an informant but becomes a material witness to the criminal act).

tation and fair trial, apply to the disclosure problem in a somewhat similar, yet clearly distinguishable situation, that of entrapment.

The defense of entrapment exists where law enforcement officers have through inducements, reasonably sufficient to overcome the resistance of one not a seasoned offender, caused a person to commit a violation of the law.[23] It has been suggested that this defense is based on the same constitutional grounds as are the unreasonable search and seizure cases.[24] It has been held that entrapment deals with the validity of a defense to a crime, rather than with the legality of the evidence.[25] This defense was first accepted by a federal court in the case of *Woo Wai v. United States.*[26] Several years later in *Sorrells v. United States,*[27] the Supreme Court dealt with the entrapment question. The majority opinion adopted a test which would look toward the origin of the criminal intent to see if an entrapment situation is present,[28] while the minority looks only to the conduct of the officers.[29] Recently, in the case of *Sherman v. United States,*[30] the Supreme Court cited the language of the *Sorrells* case (majority opinion) in stating that "entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials."[31] But regardless of which line of authority is applied, an entrapment situation may well present problems in relation to disclosure of informants' identities.

Let us assume that the government used as an informant a drug addict, who met the accused, also a drug addict, and feigned friendship. Let us further assume that the accused had been "off" drugs for over a year and was sincerely attempting to rehabilitate himself. The informant after repeatedly attempting to get the accused to procure drugs for him, finally succeeded by claiming that he was in great pain from the lack thereof. At the trial, the government introduces substantial evidence of the illegal purchase of drugs, but when asked on cross-examination to disclose the identity of the informant refuses, claiming a privilege of non-disclosure. It is obvious in this case that the accused might well want to know the identity of the informer in order to establish the defense of entrapment.[32] As such, it is equally

23. Wall v. United States, 65 F.2d 993 (5th Cir. 1933). See Donnelly, Judicial Control Of Informants, Spies, Stool Pigeons, And Agent Provocateurs, 60 Yale L.J. 1091, 1098-1115 (1951).
24. Id. at 1111.
25. Ibid.
26. 233 Fed. 412 (6th Cir. 1916).
27. 287 U.S. 435 (1932).
28. Id. at 445.
29. Id. at 457.
30. 356 U.S. 369 (1958).
31. Id. at 372.
32. See text supported by note 23 supra.

evident that to deprive the accused of such information is to deprive him of a material, and perhaps essential, element of his defense. It is in this regard, it is submitted, that a failure to require disclosure in the instant case would be in conflict with the accused's right to confrontation and his right to due process in much the same manner as has been discussed in the section of this note dealing with informant-participants.[33]

The privilege against disclosure of an informant's identity is, and should be, as applicable to the various discovery devices as at the trial itself.[34]

Federal and state constitutions contain provisions protecting individuals from unreasonable search and seizure by law enforcement agencies.[35] Unreasonable searches and seizures are those which are neither made pursuant to a warrant nor incidentally to a valid arrest.[36] To enforce this constitutional safeguard the Supreme Court of the United States has held that in criminal prosecutions, in federal courts, illegally obtained evidence is inadmissible.[37] A number of states have adopted this federal rule of exclusion.[38] Thus it becomes obvious that,

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33. See text supported by notes 20-22 supra.

34. United States v. Schneiderman, 104 F. Supp. 405 (S.D. Cal. 1952) was a prosecution for violation of the Smith Act. The defendant, in the preparation of his defense, had a subpoena duces tecum issued directing the government attorney to bring certain documents into court. The government, in response, brought in all documents except those that might involve the danger of disclosure of informants' identities and the court sustained this action stating that even if the informants were to be called as prosecuting witnesses at the trial and their identity thus disclosed the public policy favoring their protection would preclude disclosure prior to the time when the informants became witnesses.

It should be pointed out that this note does not concern itself with the situation presented in Jencks v. United States, 353 U.S. 657 (1956), which involved communications to the F.B.I., made by informants, who were witnesses at trial, rather than to the disclosure of the identity of the informants.

See United States v. Sun Oil Co., 10 F.R.D. 448 (E.D. Pa. 1950) (court refused to compel disclosure of informants' identities sought through written interrogatories submitted prior to trial); United States v. Lorain Journal Co., 10 F.R.D. 487 (N.D. Ohio 1950) (pre-trial motion for discovery of names of informants who complained to the government prior to initiation of civil action charging violation of anti-trust statutes against defendant).

35. U.S. Const. Amend. IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."

In Harris v. United States, 331 U.S. 145 (1947), Justice Frankfurter points out that: "the constitution of every state contains a clause like that of the Fourteenth Amendment and often in its precise wording." Id. at 160.

36. Cannon v. United States, 158 F.2nd 952 (5th Cir.), cert. denied, 330 U.S. 839 (1947).

37. Weeks v. United States, 232 U.S. 383 (1914).

38. Wolf v. Colorado, 338 U.S. 25, 38 (1949) indicates that the following states

since a defendant may move to suppress or return illegally obtained evidence under the foregoing exclusionary rule, the issue of probable cause becomes an essential element of the accused's defense.[39] Whether or not the government will be allowed the privilege of nondisclosure, in matters involving probable cause, depends on the particular facts of a given case. The answer to this question can best be seen by an examination of several distinct, but basic, fact situations.

Let us assume that an informant has conveyed to the police information that on a given night *X* will board a plane carrying illegal gambling materials. Let us further assume that the police, upon seeing *X* board the plane, search his baggage and seize as evidence its illegal contents. *X* at trial moves to suppress the evidence claiming unreasonable search and seizure because of lack of probable cause. The state then attempts to show probable cause by relying solely upon the informant's communication, yet claiming that they need not reveal his identity because of the governmental privilege as to informants. Courts which have been confronted with this type situation are not unanimous as to whether disclosure will be compelled.[40] The Supreme

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are in agreement with the Weeks case doctrine: Fla., Idaho, Ill., Iowa, Ky., Mich., Miss., Mo., Mont., Okla., S.D., Tenn., Wash., W.Va., Wis., Wyo. Also in Rickards v. State, 6 Terry 573, 77 A.2d 199 (1950) Delaware has by decision adopted the Weeks case view. See also, Annot., 50 A.L.R.2d 531 (1956).

39. Carroll v. United States, 267 U.S. 132 (1925) (where in a criminal proceeding the action is based upon evidence obtained during search without warrant the prosecution must show probable cause for conducting the search); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932) (prosecution for the possession of liquor against the Democratic League of Delaware. Defendant made a motion to suppress the evidence on the ground that it was illegally obtained. On this motion Wilson, a government agent, was called as a witness and he stated that he had entered defendant's premises through the use of a key furnished by him by one of defendant's members. On cross-examination Wilson refused to reveal the identity of this informant. The court held him in contempt saying that if such key were not in fact furnished by a member of the League then the evidence was illegally obtained and thus subject to the motion to suppress).

40. Cases not requiring disclosure for admission of the evidence: McInes v. United States, 62 F.2d 180 (9th Cir. 1932), cert. denied, 288 U.S. 616 (1933); Shore v. United States, 49 F.2d 519 (D.C. Cir. 1931), cert. denied, 285 U.S. 552 (1932); Goetz v. United States, 39 F.2d 903 (5th Cir. 1930); United States v. Rogers, 53 F.2d 874 (D. N.J. 1931), aff'd sub. nom. Burkis v. United States, 60 F.2d 452 (3d Cir.), cert. denied, 287 U.S. 655 (1932); People v. Gonzales, 141 Cal. App. 2d 604, 297 P.2d 50 (1956).

Cases requiring disclosure for admission of the evidence: McQuaid v. United States, 198 F.2d 987 (D.C. Cir. 1952), cert. denied, 344 U.S. 929 (1953); United States v. Heitner, 149 F.2d 105 (2d Cir. 1945); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Blich, 45 F.2d 627 (D. Wyo. 1930); Priestly v. Superior Court 330 P.2d 39 (Cal. 1958); Perry v. State, 150 Miss. 293, 116 So. 430 (1928); State v. Edwards, 317 S.W.2d 441 (Mo. 1958); Smith v. State, 169 Tenn. 633, 90 S.W.2d 523 (1936).

Court of the United States has, in fact, avoided any decision on this issue in two instances.[41] It is submitted that in these cases—cases in which the informant's testimony is the sole ground for the finding of probable cause—a failure to compel disclosure, if demanded, would be a denial of the accused's rights to confrontation and fair trial. If the above fact situation were modified so that the informant's information was but a portion of the grounds of probable cause, i.e., that the police by their own observation supplied the other portion, then we find the courts still split as to whether disclosure will be required.[42] It would again seem that failure to require disclosure would be a violation of the accused's rights to confrontation and fair trial. But, if we vary the facts but one step further by assuming that the police had a sufficient quantum of evidence to establish probable cause independent of the information given by the informant, then it is clear that the courts will not compel disclosure of the informant's identity.[43] And, it is submitted that this is a just result, for the informant is neither being used as a witness against the accused nor in any manner which might affect his right to due process, a fair trial.

Of similar tenor are those cases in which an unidentified informant's information is relied upon as the probable cause basis for the arrest of the accused.

Where a search is conducted incidentally to an arrest made without probable cause, or without a warrant based upon probable cause, it will be held unlawful.[44] Therefore it seems that if the defendant is attempting to establish that the arrest was unlawful he should be able to persuade the court to compel the government to disclose the identity of the informant whose information is relied on to establish probable cause.[45] Yet, it has been held that where the arresting officer is tes-

41. Husty v. United States, 282 U.S. 694 (1931); Segurola v. United States, 275 U.S. 106 (1927).

42. Holding disclosure necessary: United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937) (the court must have all the facts before it to determine whether the officer had probable cause); United States v. Blich, 45 F.2d (D. Wyo. 1930) (officer cannot be allowed to establish probable cause on his blanket testimony that he was informed by a reliable person).

Holding disclosure unnecessary: United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945) (there is no reason to suppose that hearsay evidence derived from an informant is not as competent evidence on which to show probable cause as any other proof).

43. United States v. Bianco, 189 F.2d 716 (3d Cir. 1951); Scher v. United States, 305 U.S. 251 (1938); Segurola v. United States, 16 F.2d 563 (1st Cir. 1926), aff'd, 275 U.S. 106 (1927); Harris v. State, 63 So. 2d 396 (Miss. 1953).

44. United States v. Clark, 29 F. Supp. 138 (W.D. Mo. 1939); People v. Chatman, 322 Ill. App. 519, 54 N.E.2d 631 (1944).

45. United States v. Heitner, 149 F.2d 105 (2d Cir.), cert. denied, 326 U.S. 727 (1945); Segurola v. United States, 16 F.2d 563 (1st Cir. 1926), aff'd, 275 U.S.

tifying about the arrest to the court, disclosure will not be required if the court is satisfied that the information was derived from a reliable source.[46] One case has held that discoveries made subsequent to the arrest may confirm the existence of probable cause and thus eliminate the necessity of disclosure.[47]

Depending on the particular case, courts refer to informants as participants, decoys, or leads. And, if a court chooses to require disclosure, it does so by saying that the informant was a material witness to the offense, an active participant in its accomplishment, an essential element to the defense, or a person whose credibility in all equity should not be accepted without the usual test of cross examination. But, it is again submitted that such phrases merely voice a conclusion reached by the court, that being that in the particular case an invocation of a privilege of non-disclosure would do violation to an accused's right to cross examine and face the witnesses against him, the right of confrontation, and that such invocation would further do violation to his right of due process of the law, the right to a fair trial.

There is general acceptance of the privilege of non-disclosure in civil cases prosecuted by the government against a defendant party.[48] In certain instances the court may compel disclosure on the theory that the government, by bringing the suit, has impliedly waived any right to suppress relevant material and that the identity of informants is included within this implied waiver.[49] Should the court refuse to accept the waiver theory, defendant may argue that it should be protected from the introduction of testimony of unknown witnesses and thus move the court to compel disclosure.[50]

If, on the other hand, a party wishes to bring a tort action against an informant who has informed falsely, he will not fare too well. In suits for libel, slander, and malicious prosecution, the plaintiff will often, and many times successfully, be met with a claim of the privilege of non-disclosure. Yet it is clear that "without producing the de-

106 (1927); Hamilton v. State, 149 Miss. 251, 115 So. 427 (1928); Shields v. State, 270 S.W.2d 367 (Tenn. 1954).

46. Simmons v. State, 281 S.W.2d 487 (Tenn. 1955).

47. People v. Gonzales, 141 Cal. App. 2d 604, 297 P.2d 50 (1956).

48. United States v. Shubert, 11 F.R.D. 528 (S.D.N.Y. 1951) (anti-trust); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943) (wage-hour).

49. Fleming v. Bernardi, 1 F.R.D. 524 (N.D. Ohio 1941). Cf. United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944) which seems to have carried this idea over to criminal cases, the court stating that a prosecution for crime ends any confidential character that may be possessed by documents touching on criminal dealings thus that disclosure will then be necessary.

50. Boudin v. Dulles, 136 F. Supp. 218 (D.C.D.C. 1955), aff'd on other grounds, 235 F.2d 532 (D.C. Cir. 1956); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

fendant's words, the plaintiff has scant hope of carrying his day in court."[51]

In administrative hearings, informants are used to an extent that would not be allowed in normal courtroom proceedings.[52] In many administrative proceedings decisions are based, to a large extent, on communications from informants,[53] yet even when the actual communications of the informant are openly introduced into evidence the court will often not compel the government to disclose the identity of its informants.[54] In many of these proceedings identity of the informant remains unknown not only to the parties thereto but also to the deciding body before whom the proceedings are taking place.[55] It is true, however, that certain administrative proceedings have been negatived where the accused has been denied the right to be confronted with his accuser.[56] Parties before an administrative body engaged in adjudication are ordinarily permitted to conduct cross examination,[57] therefore, the court may hold that denial of cross examination was prejudicial error where an informant's identity was not disclosed and played a part in determination of the decision.[58] It cannot be doubted that the fundamental concepts of fairness and due process are as applicable to administrative bodies exercising adjudicatory functions as to criminal proceedings before judicial bodies.

It is not clear whether the courts will uphold this privilege when it is being claimed by government officials being examined before a grand jury.[59] In such a proceeding or in a proceeding before a legis-

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51. Note, 63 Yale L.J. 206, 217 (1953).

52. See O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592 (1948).

53. Bontecou, The Federal Loyalty-Security Program 60-61 (1953) points out that the Government's employee security program has a rule of absolute secrecy regarding the identity of confidential informants.

54. Kwock Jan Fat v. White, 253 U.S. 454 (1920) (native-born alien prevented from re-entry into the United States after leaving the country for trip abroad).

55. Boudin v. Dulles, 136 F. Supp. 218 (D.C.D.C. 1955), aff'd on other grounds, 235 F.2d 532 (D.C. Cir. 1956).

See Richardson, The Federal Employee Loyalty Program, 51 Colum. L. Rev. 546, 549 (1951); Note, 63 Yale L.J. 206, 221-22 (1953).

56. In Shaughnessy v. Mezel, 345 U.S. 206, 225 (1953), the court states that: "[T]he right . . . to be confronted with the accuser, to cross examine informers and to produce evidence in one's behalf, is especially necessary where the occasion . . . is fear of future misconduct."

57. See Administrative Procedure Act § 7(c), 60 Stat. 241 (1946), 5 U.S.C. § 1006 (c) (1952).

58. Powhatan Mining Co. v. Ickes, 118 F.2d 105 (6th Cir. 1941).

59. Both In re Kohn, 227 La. 246, 79 So. 2d 81 (1955) and People v. Keating, 286 App. Div. 150, 141 N.Y.S.2d 562 (1955) involved citation of a witness for contempt of court for refusing to disclose the source of his information before a grand jury. But it should be noted that in neither case did the court pass upon

lative committee where the government seeks to establish the basis for a criminal proceeding, disclosure may be required.[60] It is submitted that the privilege should be as available in this situation as in the ordinary court proceeding, since the same public policy, that of encouraging communications from informants, is present. As a practical matter grand jury proceedings are not as secretive as their statutory bases connote. The existence of a mere possibility that his identity will be disclosed will have a prohibitory effect on the informant which would thus impair effective law enforcement. Also because grand jury proceedings are not accorded the full measures of judicial process inherent in trial proceedings,[61] it would seem that the juridical policy of the fair trial would not be as effective here to impair the claim of privilege.

It is generally held that the privilege may only be invoked by a public official acting in the performance of his duties.[62] A problem arises where the recipient of the information is not such public official but rather the investigative officer of a statutory[63] or ordinance-created investigatory body. Two recent cases have denied extension of the privilege in the latter situation holding that such an officer was too far removed from the degree of officiality requisite to a reliance upon the non-disclosure privilege.[64] There is no apparent reason for the

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the availability of the privilege before the grand jury, the adjudgment of contempt instead resting upon the lack of official government status of the person claiming the privilege.

In Sullivan v. Hill, 73 W.Va. 49, 79 S.E. 670 (1913) a prosecuting attorney, testifying before a legislative committee, was compelled to disclose his information and its source regarding an alleged bribery for which criminal prosecution was in contemplation.

60. In re Kohn, 227 La. 246, 79 So. 2d 81 (1955) (chief investigator of ordinance-created investigatory body before grand jury); Sullivan v. Hill, 73 W.Va. 49, 79 S.E. 670 (1913) (prosecuting attorney before legislative committee).

61. In Gilmore v. United States, 129 F.2d 668 (2d Cir. 1942), the court held that the inquiry made by the grand jury was not a criminal prosecution within the scope of the sixth amendment.

Cf. United States v. Costello, 221 F.2d 668 (2d Cir. 1955) (holding that hearsay evidence is sufficient to support a grand jury's indictment); In re Black, 47 F.2d 542 (2d Cir. 1931) (witness before grand jury not entitled to counsel); People v. Barbour, 273 N.Y. Supp. 788, 152 Misc. 39 (1934) (the grand jury serves merely an accusatory function).

62. Roscoe, Digest of the Law of Evidence in Criminal Cases 182 (2d ed. 1840); 8 Wigmore, Evidence § 2374 (3d ed. 1940).

63. The privilege extends to the identity of informants aiding investigating officers as well as arresting officers. See Scher v. United States, 305 U.S. 251 (1938); Mitrovitch v. United States, 15 F.2d 163 (9th Cir. 1926); Goetz v. United States, 39 F.2d 903 (5th Cir. 1930).

64. In re Kohn, supra note 59 (Kohn was chief investigator of a municipally created committee which was engaged to investigate the police department. He was cited for contempt for his refusal to obey the court's order to disclose an

courts to deny summarily the availability of the privilege in this instance. These quasi-public investigatory bodies, which have governmental authorization for their existence, are auxiliary to effective law enforcement, and utilization of the informant seems, therefore, just as necessary as in the ordinary law enforcement body.[65] It is submitted that for the privilege to have the salutary effect of encouragement of informants, it should extend to all persons who form links in the chain by which information is conveyed to law enforcement agencies.

Many states have statutes which may add another basis for prevention of disclosure,[66] providing in substance that a public officer may withhold communications made to him in official confidence. It is arguable that this type of statute furnishes a ground upon which the government may sustain its concealment of the identity of its informants, since these statutes refer to communications made to officials and clearly the conveyance of an informant's name to an official is a communication. However, this argument is substantially weakened by the many decisions holding that such statutes are only codifications of the traditional governmental privilege.[67]

Occasionally, courts have analogized this privilege to the attorney-client privilege, thus holding it personal to the informant and waivable by him.[68] Although both privileges are used on a desire to encourage full disclosure, the characterization of the latter privilege as one belonging to the communicant is illogical. This is true for a number of reasons; first, the attorney-client privilege does not usually protect

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informant's name before the grand jury); People v. Keating, supra note 59 (Keating was employed as counsel for a private organization created at the suggestion of the grand jury. He made public charges regarding police officials and was later cited for contempt when he refused to reveal the source of his information before the grand jury).

65. Cf. note, 46 J. Crim. L., C. & P.S. 843, 846-47 (1955).

66. See, e.g., Iowa Code Ann. § 622.11 (1950) which provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure."

67. State v. Hoben, 36 Utah 186, 102 Pac. 1000 (1909). See also Note, 63 Yale L.J. 206 (1953).

68. In Steen v. First Nat'l Bank, 298 Fed. 36 (8th Cir. 1924) the plaintiff, in an action for malicious prosecution, asked the prosecuting attorney to reveal the identity of the informant who gave him the information to proceed against the plaintiff in another action. Defendant objected but the court held that since defendant had testified at a preliminary hearing to a conversation between himself and the prosecuting attorney the privilege of non-disclosure was precluded. The court compelled the prosecuting attorney to reveal the identity of the informant.

Pihl v. Morris, 319 Mass. 577, 66 N.E.2d 804 (1946) held that the identity of an informant becomes a matter of record when he files complaint and that in a later action by the accused for slander and malicious prosecution the identity must be disclosed by the state attorney.

the identity of the client[69] and secondly, the attorney-client privilege is based on the protection of a private relationship,[70] whereas, the governmental privilege is based on a public relation and the policy supporting it. Should the government official, who is the recipient of the information, be an attorney, a court might accept this as an additional basis on which to support non-disclosure.[71] It is submitted, however, that this is not a valid ground upon which to extend the privilege.

When a situation exists wherein the privilege of non-disclosure is rendered inapplicable and the government refuses the court's order to disclose, the trial court may dismiss the action.[72] In a criminal prosecution, if the trial court failed to require disclosure when it had been properly demanded, there will be reversal of the conviction so obtained.[73] It is not necessary in such circumstances that the defendant show this denial of disclosure was prejudicial; it is sufficient to establish that disclosure should have been compelled.[74] When the informant's identity has been disclosed through other sources, the court may find the error harmless and refuse to upset the conviction or administrative proceeding below.[75] Where the aggrieved party fails to demand disclosure in a situation where it is compellable, an appellate court will not reverse.[76] The rationale of this is that government is under no duty to disclose voluntarily the informant's identity. When there has been a conviction on two counts, but the sentence imposed was not in excess of that which could have been imposed on one count, then error in failing to require disclosure on one count will not neces-

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69. Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826); People ex rel. Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 363 (1934).

70. 8 Wigmore, Evidence § 2313 (3d ed. 1940).

71. Vogel v. Gruaz, 110 U.S. 311 (1884); Ratzlaff v. State, 122 Okla. 263, 249 Pac. 934 (1926).

72. Roviaro v. United States, 353 U.S. 53 (1957); United States v. Keown, 19 F. Supp. 639, 646 (W.D. Ky. 1937); People v. McShann, 330 P.2d 33 (Cal. 1958).

73. Portomene v. United States, 221 F.2d 582 (5th Cir. 1955).

74. In Portomene v. United State the court states that: "When . . . a right . . . is denied a defendant on trial for his liberty, it does not lie in the mouth of the government to say that, though the court erred by depriving the defendant of the information he sought and to which he was entitled, and thus visited a wrong upon him, the conviction should nevertheless stand because the amount and extent of the prejudice is not precisely shown. Appellate courts sit to right, not to condone such wrongs." 221 F.2d at 584.

75. Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947) (informant's identity disclosed by other witnesses); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946), cert. denied, 330 U.S. 839 (1947).

76. United States v. Conforti, 200 F.2d 365 (7th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

sitate reversal on the second.[77] A governmental witness may be cited for contempt for refusal to comply with a court's order to disclose the identity of an informant.[78] It is submitted that if in a given situation certain facts are held to be so essential as to require disclosure of an informant's identity, then a citation for contempt for refusal to disclose without a concomitant suppression of the evidence or dismissal of the case would not obviate the requirement of basic fairness underlying this entire area of the law.

In summary, it becomes apparent that the government will be faced with a difficult decision in any action to which it is a party. Where the government seeks to establish its cause through information secured from confidential informants, and the court or other deciding body determines that the informant's identity is essential to a fair disposition of the cause, the government must either disclose or forego participation in the proceeding. The government must ascertain which need is the greater—that of protecting its source of information or consummation of the pending action. That this balancing of interests will place a substantial burden on government is not unreasonable. It should be pointed out that the concealment of the identity of these informants will, where allowed, involve *some* encroachment on the rights of a party litigant to a fair trial. It is in this regard that Justice Frankfurter's stern invocation against allowance of the privilege comes to mind:

> The very purpose of a hearing is to give registrants an opportunity to meet adverse evidence. It makes a mockery of that purpose to suggest that such adverse evidence can be effectively met if its provenance is unknown.[79]

It is further evident that regardless of the terms the courts use, they will and should require disclosure in situations where its denial would violate an accused's right to be confronted by the witnesses against him, or his right to a just measure of due process, a fair trial.

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77. United States v. Roviaro, 229 F.2d 812 (7th Cir. 1956), rev'd on other grounds, 353 U.S. 53 (1957).

78. Wilson v. United States, 59 F.2d 390 (3d Cir. 1932) (court proceeding); In re Kohn, 227 La. 246, 79 So. 2d 81 (1955) (grand jury).

79. Justice Frankfurter dissenting in United States v. Nugent, 346 U.S. 1, 13 (1953).