

U.S. 105 (1875) (State secrets); *Scher v. United States*, 305 U.S. 251 (1938) (identification of informants); and *United States v. Reynolds*, 345 U.S. 1 (1953) (military secrets). In each of these cases the Court recognized a privilege of the Executive based upon the nature of the information involved.

Mr. KASS. What about the *Reynolds* case, *United States v. Reynolds*? A 1953 decision.

Mr. SCHLEI. Well, let me just see if that is the case that I think I remember. Was that a litigation about an airplane crash?

Mr. KASS. Correct.

Mr. SCHLEI. In which the question was the availability of a Government investigative report about whose fault the crash was?

Mr. KASS. This is correct.

Mr. SCHLEI. Yes. And the court, as I recall, held that that report did not have to be disclosed.

Mr. KASS. On what basis though?

Mr. SCHLEI. Well, my recollection was that the basis at least in part was the doctrine of executive privilege.

Mr. KASS. But did not the court at one point say, and I quote from Justice Vinson's opinion on page 8, that—

The Court itself must determine whether the circumstances are appropriate for the claim of privilege.

Mr. SCHLEI. Yes.

Mr. KASS (reading):

And yet do so without forcing the disclosure of the very thing the privilege is designed to protect.

Mr. SCHLEI. Well, Mr. Kass, the difference there I think is that that was a question of executive privilege vis-a-vis the courts rather than the public or the Congress. So that you got into an area where the courts have some privileges of their own.

Now, if the court decides that it is not going to honor a claim of executive privilege, the court I do not think would take the position that it could compel the President to disgorge a state paper which he considered crucial to the Republic. What they would do is say, "You cannot proceed in this litigation. We are going to throw you out of court—or, perhaps decide the issue here involved against you—unless that document is produced."

So there is a judicial privilege in effect that limits and is juxtaposed against the executive privilege that might have come into play in that situation.

Mr. KASS. Now, the *Reynolds* case dealt with a matter of state and military secrets. What about the recent court of appeals case *Machin v. Zuchert*, where the same factual situation existed except the Air Force said there were no classified documents involved. The court said that they are going to determine what information will be made available to Mr. Machin. Are you familiar with that case?

Mr. SCHLEI. I am sorry to say I am not.

Mr. KASS. Could you, for the record, supply the information later on?

Mr. SCHLEI. Yes, indeed. Delighted to.

(The material referred to follows:)

This case establishes the proposition that to the extent that the disclosure of official information would hamper the effective operation of an important government program, the information must be treated as privileged, and such