Justice Holmes admonished nearly a century ago that "(m)en must turn square corners when they deal with the Government." Yet, far too often, attorneys representing private clients in litigation fail to heed this classic proverb when dealing with the United States. A prominent area in which federal court practice involving the federal government appears beguilingly similar to that involving other parties, but in which the rules sometimes prove to be very different, is that of civil discovery conducted against the federal government.


**Introduction**

Because the federal government is a party, as plaintiff or defendant, in between one-fifth and one-quarter of all civil cases in the federal courts, any practitioner in the federal courts must develop an understanding of the unique principles, rules, and statutes that govern when the sovereign United States is a party to a court action. Certain features about the federal government make a crucial difference in the way in which the government handles civil litigation and in the procedures that apply to the United States. These unique characteristics in turn affect the means by which civil litigation involving the government proceeds. Moreover, the special rules that apply to the federal government adhere even when the government is not a party to the action, such as when private litigants seek government information deemed relevant to their court disputes. The subject of discussion in this article is the federal government’s amenability to civil discovery.

As a general rule — but one subject to so many qualifications that calling it a general rule may be somewhat misleading — the discovery process under the Federal Rules of Civil Procedure applies to the federal government in the same manner as it applies to private litigants, including availability of various discovery devices, protection of work product, and sanctions to ensure compliance with discovery rules or orders. Of course, as part of judicial supervision of the discovery process, the courts will give careful consideration to the impact of the type or scope of discovery upon government operations and officials.

Moreover, discovery of information from the federal government for use in civil litigation does have a couple of different twists from the discovery that occurs in private litigation. First, while litigants in private litigation are limited to the use of formal discovery and informal investigation to uncover information, the federal government is also subject to a general duty to disclose information under the Freedom of Information Act, although, as will be seen, that avenue is unlikely to be availing to the civil litigant in most circumstances. Second, certain privileges are available only to the federal government — privileges that are designed solely with the government’s institutional interests in mind.

**General Rules of Discovery and the Federal Government**

As a general matter, the obligations imposed upon civil litigants with respect to discovery in the Federal Rules of Civil Procedure apply to the federal government when it is a party to the litigation. Thus, ordinary discovery devices, such as interrogatories and depositions, may be used. The binding effect of a deposition of a lower-level government officer may be limited because he or she may lack authority to speak as an agent of the government, although testimony as to factual matters certainly constitutes evidence other than that provided by admission. Under Rule 30(b)(6) of the Federal Rules of Civil Procedure, a party suing an organization, including a governmental agency, may require that organization to designate an officer or “managing agent” to “testify [by oral deposition] as to matters known or reasonably available to the organization.” Pursuant to Rule 32(a)(2), deposition testimony by that managing agent may be used in court proceedings as the government party’s admission.

In the case of the federal government, as with other large institutions, the courts often restrict efforts to examine or otherwise obtain discovery from senior officers of the government. In its 2004 decision in *Cheney v. U.S. District Court*, the Supreme Court held that broad requests for civil discovery directed against the most senior officials in the executive branch, such as the Vice President, raise serious concerns about the constitutional separation of powers even without a formal assertion of executive privilege. When information is sought from the highest level of the government, the Court emphasized that the burden imposed upon the government weighs against permitting discovery given “the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications.”

Even below the presidential level, the courts recognize that an “official’s time and the exigencies of his everyday business would be severely impeded” if every plaintiff filing a suit against the federal government were permitted to depose the head of a federal agency. A head of a government department will not be required to testify when deposition of a subordinate officer would serve just as well. In a recent articulation of the “heightened standard of review” that applies to a request to depose a high-ranking government official, the District Court in *Jones v. Hirschfeld* explained that such discovery will not be permitted unless the party seeking the deposition establishes that (1) the deposition is necessary to obtain relevant information that cannot be obtained from another source and (2) the deposition will not significantly interfere with the ability of the official to perform governmental duties. Even when permitted, the court ordinarily will limit the deposition of a high-level official to inquiries about factual matters and will preclude investigation of that official’s thought processes when making decisions. Alternatively, the court may direct the serving of interrogatories upon a senior-level government official in lieu of a deposition.

With respect to sanctions against the government for failure to cooperate in discovery, the government’s amenability to such sanctions has been expanded in recent years, although some special limitations persist as a matter of sovereign immunity. Sanctions provided by Rule 37 of the Federal Rules of Civil Procedure for noncompliance with the discovery rules or a discovery order include an order directing that discovery be made, an award of attorneys’ fees, an order that the matter sought to be shown shall be taken as established, or a judgment on the merits. With respect to an award of attorneys’ fees, the waiver of sovereign immunity in subsection (b) of the Equal Access to Justice Act makes the government liable for attorneys’ fees on the same basis as private parties under a statute (which includes the Federal Rules of Civil Procedure promulgated pursuant to the Rules Enabling Act) or the common law. Consequently, the imposition of attorneys’ fees, a strong sanction for noncompliance with the dis-
covery rules, is available in a case against the federal government. In addition, when merited, the courts have precluded the use of a particular defense to a claim against the government as a sanction. However, under Rule 55(e) of the Federal Rules of Civil Procedure, a default judgment may not be entered against the United States “unless the claimant establishes a claim or right to relief by evidence satisfactory to the court,” which presumably also precludes a default judgment as an ultimate sanction for disobedience of a discovery order. Imposition of a personal fine upon the government lawyer is yet another sanction that may be imposed.

When the government is not a party to the civil litigation, the availability of discovery against the government is less restrictive, although the courts disagree to what extent. To begin with, subordinate officers and employees have a special immunity from subpoenas information they possess in their governmental capacity. Under the Supreme Court’s decision in United States ex rel. Touhy v. Ragen, a lower-level government official is not required to produce official files or disclose “any other information or material acquired as part of the performance of his official duties or because of his official status” in response to a subpoena or order issued in a lawsuit between private parties. Thus, any subpoena or other discovery request must be directed to the head of the federal agency or department. Pursuant to the federal housekeeping statute, most agencies have adopted procedures, often termed “Touhy regulations,” to direct the agency how to respond to subpoenas.

As to how the agency itself, or the head of the agency, should respond to discovery requests when the government is not a party to civil litigation, one appellate court has conceded that “the courts are in some disarray.” In Exxon Shipping Co. v. U.S. Dept. of Interior, the Ninth Circuit ruled that “district courts should apply the federal rules of discovery when deciding on discovery requests made against government agencies, whether or not the United States is a party to the underlying action.” Still, even the Exxon court recognized that the federal government has a “serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations.” While the Ninth Circuit believed that any governmental claim of hardship or privilege could be adequately protected under the discovery rules, most appellate courts that have addressed the question have shown even greater solicitude for the government’s interests by applying the deferential standards of review under the Administrative Procedure Act (APA) to evaluate agency responses to subpoenas.

In the end, whether reviewed by the court under discovery rule standards or, instead, under APA standards that are more deferential to the government, the private litigant seeking discovery when the government is not a party will not be “guaranteed access, at public expense, to the … evidence of agency employees,” and the court will consider not only the private interest in obtaining evidence in the lawsuit but also the public interest in “con-
taint background information from the government about a subject matter or about the administration of a government agency. In the wake of Weber Aircraft, attorneys for private parties also may use the FOIA to supplement discovery by seeking documents before a lawsuit against the federal government has been initiated so that formal discovery would be available or by obtaining documents that may not be “relevant” within the meaning of discovery rules but might still be helpful in litigation (although relevance is so broadly defined in discovery that this supplementation should seldom be necessary). \(^{22}\)

Although a party engaged in active litigation remains entitled to use the FOIA, as does any member of the public, the litigant generally should not be able to obtain information that would be unavailable in discovery. To be sure, it is possible that the government employee who has received an FOIA request might not recognize that sensitive information was being requested or that the matter was in litigation and thus might accidentally disclose exempt materials. Professor Edward Tomlinson has suggested that a party in litigation with the government is obliged to provide government counsel with notice of all litigation-related FOIA requests, thus allowing the government to coordinate responses to discovery and FOIA requests.\(^{23}\) In addition, as a matter of professional ethics related to communications with represented parties, under Rule 4.2 of the American Bar Association’s Model Rules of Professional Conduct, an attorney representing a person or entity engaged in or contemplating litigation against the federal government may be obliged to disclose that fact when corresponding about the matter with an employee of the subject agency; this includes submitting an FOIA request (whether made directly by the attorney or by someone else at the attorney’s direction). The employee so notified presumably would consult with government counsel before responding to the FOIA request.

**Federal Government Privileges and Protection of Work Product**

**Introduction to Federal Government Privileges**

Another way in which discovery in litigation with the federal government varies from that among private parties is that certain privileges from discovery are available only to the federal government and are designed solely with the government’s institutional interests in mind. Although the issue of privilege is also a matter of evidence and thus may arise at trial in terms of a request to deny admission of the evidence, government privilege issues more frequently arise in the course of pretrial discovery when the government resists discovery or seeks a protective order.

The mere confidentiality of a government document (that is, the determination by the government to keep it secure and refuse to disclose it voluntarily) does not make it privileged and put it beyond the court’s authority to order its disclosure in a judicial proceeding. When the government asserts a nonprivileged basis for keeping a document confidential, the court will determine within the normal discovery process whether the information must be produced.\(^{24}\) However, beyond ordinary assertions of confidentiality, the courts have recognized government privileges in cases where disclosure would seriously impair governmental operations, undermine deliberative candor, or endanger national security. Recognition of a privilege does not necessarily mean that it is absolute. Decisions on claims of privilege for government documents require weighing two conflicting considerations: (1) the public need to keep secret or uninterrupted the particular facet of government operations involved and (2) the right of the private litigant to obtain information in support of his or her claim or defense, that is, the interest of the judicial administration of justice.

**Executive Communication Privileges**

 Constitutional scholar Laurence Tribe says that it is “more accurate to speak of executive privileges, for presidential refusals to furnish information may be acted upon by any of at least three distinct kinds of considerations,”\(^{25}\) including the state secrets doctrine, protection of confidential informants, and protection of internal deliberations. Animating such limitations on discovery, as well as generally weighing against intrusive civil discovery into the activities of the government at “its highest level,” are what the Supreme Court recently described in *Cheney v. U.S. District Court*\(^ {26}\) as “the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications.” When executive privilege is asserted, the Court explained, “[t]he Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives.”

As a facet of executive privilege, the “deliberative process” privilege, which applies to the documents that make up the flow of the government’s decision-making process, is the one most frequently invoked by the government.\(^ {27}\) The Supreme Court has described this deliberative process privilege as covering “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”\(^ {28}\) As the Court explained in the context of exemption of such information from disclosure under the Freedom of Information Act, “[t]he deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance ‘the quality of agency decisions,’ by protecting open and frank discussion among those who make them within the Government.”\(^ {29}\)

The deliberative process privilege protects “predecisional” and “deliberative” materials, but not those that “simply state or explain a decision the government has already made or … material that is purely factual.”\(^ {30}\) While the privilege must be claimed by the senior government official responsible for the matter involved and must be based on actual personal consideration by that official, the privilege does not need to be invoked by the overall
head of the government department or agency. The deliberative process privilege is qualified and may be overcome by a sufficient showing of need.

As the most exalted form of executive privilege, the presidential privilege that is specific to the President more broadly “applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.” As with the generic deliberative process privilege, the presidential communication privilege may be overcome by a sufficient showing of need, although presumably the required showing is higher.

In United States v. Nixon, the famous Watergate tapes opinion in 1974, the Supreme Court recognized a presidential privilege covering confidential communications between the President and his advisers. The Court, however, concluded that, in that case, the privilege was outweighed by the constitutional demands of the criminal justice system and the need in a pending criminal trial for potentially relevant evidence in the presidential discussions in the White House that had been recorded on the tapes. President Nixon resigned shortly after these tapes were released.

In the 2004 decision of Cheney v. U.S. District Court, a case that did not involve a formal invocation of executive privilege, the Supreme Court nevertheless emphasized that civil discovery against senior officials in the executive branch, such as the Vice President, raises serious concerns about the constitutional separation of powers. In Cheney, the Court did not approve the plaintiffs’ “overly broad discovery requests” related to the activities and alleged improper participation of industry representatives on an energy policy development group that was headed by the Vice President and included other senior government officials. The Court held that “the public interest requires that a coequal branch of government [the Judiciary] ‘afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.’”

The Cheney Court further observed that a request for information in a criminal case, such as United States v. Nixon, implicates constitutional considerations regarding production of relevant evidence to achieve justice and “the court’s ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction” that may, in certain circumstances, override the chief executive’s concerns for confidentiality. By contrast, “[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests.” In sum, the Court explained, the “right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions.’”

Another case presenting a prominent clash between presidential privilege and civil litigation is that of Dellums v. Powell, which was decided by the U.S. Court of Appeals for the District of Columbia Circuit in 1977. In Dellums, a class of 1,200 plaintiffs filed claims against various officials alleging a violation of their civil rights caused by their arrests during a May Day anti-Vietnam War demonstration that took place in Washington, D.C., in 1971. The plaintiffs issued a subpoena to President Gerald Ford’s counsel asking for tapes and transcripts of conversations at the Nixon White House about the demonstrations. Former President Nixon filed a motion to quash the subpoena, asserting executive privilege, which the District Court denied.

On appeal in Dellums, the District of Columbia Circuit Court rejected the argument that presidential privilege is absolute in civil cases, concluding that, even though there is a presumption that the privilege controls in a civil case, it can be overcome by a strong showing of need. Indeed, the court held that the privilege was overcome in that case, because the plaintiffs had demonstrated a substantial need for the information to explore the possibility of an alleged conspiracy among high-level officials to violate the constitutional rights of citizens. Moreover, based upon other court trials involving the same episode and other governmental officials, the plaintiffs already had made a strong showing on the merits of the case — which was based on sources other than the privileged information — that such a conspiracy had existed. Thus, rather than merely presenting allegations in a complaint (which the court suggested would be insufficient to overcome the privilege), the plaintiffs had made a concrete factual showing based on other evidence and thus had made a prima facie showing that was sufficient to overcome the privilege in the search for additional information about the conspiracy to violate their civil rights.

**State Secrets Doctrine**

In addition to the protection of communications and deliberative documents afforded by executive privilege, which may be overcome in appropriate cases, a well-nigh absolute privilege exists for military, diplomatic, and comparable secrets. The “state secrets doctrine” applies when the court determines “from all the circumstances of the case, that there is a reasonable danger” that disclosing the information in court proceedings will harm national security interests, impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt relations with other nations. The Supreme Court held in United States v. Reynolds that “[f]or there must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” Indeed, “decisions involving the more sensitive and absolute privilege for state and military secrets have been more insistent on assertion at the highest level.”

In contrast with many other privileges, when properly invoked, the state secrets privilege is absolute, “rendering the information unavailable.” In these cases, no balancing of interests occurs; indeed “that balance has already been struck” in favor of the government, and thus “[n]o competing public or private interest can be advanced to compel disclosure of information found to be protected” by this privilege. “Although harsh, the presence of a properly invoked state secrets privilege requires dismissal of the claim [or preclusion of the defense] that cannot prevail without the privileged information.”

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When the subject matter of the action implicates a secret espionage relationship with the United States, the action may not proceed. In its 2005 decision in *Tenet v. Doe*, the Supreme Court held that public policy precludes suits against the United States based upon an alleged covert espionage relationship, such as a purported secret contract to provide financial assistance to a person who agrees to spy on behalf of the United States. Rather than constituting a mere “example of the state secrets privilege,” the Supreme Court held that the absolute bar against suit based upon a clandestine espionage relationship is categorical and jurisdictional in nature.

**Other Government Privileges**

In *United States v. Proctor & Gamble Co.*, the Supreme Court rejected the demand of a defendant in a government civil antitrust suit for “wholesale production” of the minutes of a grand jury criminal investigation, noting that the “indispensable secrecy of grand jury proceedings” is designed to encourage witnesses to testify, to prevent tampering with the jurors, to protect the innocent, and generally to ensure the freedom and success of the grand jury in its deliberations. On remand, however, the District Court found that the government had improperly used the grand jury “simply to elicit evidence in and for a civil case,” rather than to seek an indictment, and thus permitted eventual discovery of the grand jury transcript. Subsequently, the Supreme Court also indicated that access to grand jury documents could be obtained when the requesting party made a showing of “particularized need.”

The government also has the privilege “to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.” By preserving the anonymity of informers, the privilege encourages the performance of the citizen’s duty to communicate to law enforcement officers any knowledge of criminal activity. The privilege is a qualified one, because its application requires a balancing of the need for continued anonymity against the need for the information. The privilege is most frequently invoked in criminal cases.

**Work Product Protection for the Government**

As noted by the Supreme Court in *Department of Interior v. Klamath Water Users Protective Ass’n*, the federal government also has the benefit of the traditional protection against disclosure of attorney work product, which, according to a previous Court ruling, protects the “mental processes of the attorney.” Under Federal Rule of Civil Procedure 26(b)(3), work product materials prepared “in anticipation of litigation” are protected from discovery, unless the party seeking the information demonstrates a “substantial need for the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

Because work product materials are protected in the civil discovery process, exemption number 5 concomitantly protects this material from disclosure under FOIA. Recently, the U.S. Court of Appeals for the First Circuit initially appeared to limit significantly the availability of the work product protection to the government as a basis for nondisclosure under exemption number 5 of the FOIA, although the court subsequently backed away from that analysis. In its first opinion in *Maine v. Department of the Interior*, the Court of Appeals held that, to avoid disclosure under the FOIA, the federal agency must show that such a document was created “primarily for” litigation purposes, that is, that the primary motivation for creating the document was to assist in litigation and not for another governmental purpose. However, in response to a government petition for a rehearing, the court ordered that initial opinion withdrawn from the bound volume of the *Federal Reporter*.

Subsequently, the First Circuit issued a revised opinion in *Maine v. Department of the Interior*, clarifying that an agency need only make the somewhat lesser showing that a document was prepared “because of” the prospect of litigation in order to be afforded work product protection in discovery and consequent exemption from disclosure under the FOIA. However, in that particular case, the court found that the government had failed its burden of showing that each withheld document was correlated with a lawsuit for which the documents had been created and thus had failed to demonstrate that the documents would not have been created through routine administrative action in substantially the same form, regardless of litigation.

**Conclusion**

Nearly a century ago, Justice Holmes admonished that “men must turn square corners when they deal with the Government.” Yet, far too often, attorneys representing private clients fail to heed — or even to recognize — this classic maxim regarding the federal government. Similarly, the Supreme Court has emphasized that “it is too late in the day to urge that the Government is just another private litigant.” The subject of civil discovery against the federal government certainly confirms the federal government’s special status in the courts. Although discovery against the federal government often is beguilingly similar to that involving other parties, the rules or their application sometimes prove to be quite different. Because being forewarned is to be forearmed, the reader of this article should be better prepared to appreciate those differences in treatment of the government and be able to respond appropriately.

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ENDNOTES

4 219 F.R.D. 71, 75 (S.D.N.Y. 2003); see also In re Office of Inspector General, 933 F.2d 276, 278 (5th Cir. 1991) (stating that “exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted”).
6 Kyle Engineering Co. v. Kleppe, 600 F.2d 226 (9th Cir. 1979).
10 Chibcull v. United States, 4 F.3d 1313, 1325–27 (5th Cir. 1993).
11 40 U.S. 462 (1951).
12 153 U.S. § 301.
15 34 F.3d 774, 779–80 (9th Cir. 1994); see also Linder v. Calero-Portocarrero, 251 F.3d 178, 181 (D.C. Cir. 2001).
16 90 F.3d 269, 277–78 (4th Cir. 1999); see also U.S. Environmental Protection Agency v. General Electric Co., 197 F.3d 592, 598–600 (2d Cir. 1999), amended by 212 F.3d 689, 690 (2d Cir. 2000); Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1198 (11th Cir. 1991).
17 COMSAT Corp. v. National Science Found, 190 F.3d 269, 278 (4th Cir. 1999).
18 153 U.S. § 552.
27 See In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997).
30 In re Sealed Case, 121 F.3d at 737.
32 In re Sealed Case, 121 F.3d at 745–46.
35 Id. at 2588 (quoting United States v. Nixon, 418 U.S. 683, 715 (1984)).
36 561 F.2d 242 (D.C. Cir. 1977).
38 Reynolds, 345 U.S. at 7–8.
39 Landy v. FDIC, 204 F.3d 1125, 1136 (D.C. Cir. 2000).
40 In re Under Seal, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991).
42 Ellisberg, 709 F.2d at 57.
43 McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1021–22 (Fed. Cir. 2003); see also Farnsworth Cannon v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc).
44 Totten v. United States, 92 U.S. 105, 107 (1875).
52 Published in the advance sheets at 285 F.3d 126 (1st Cir. 2002), and later withdrawn.