Brooklyn Journal of International Law

Volume 3 | Issue 2 Article 9

1977

CASE COMMENT: *Attorney General v. Covington & Burling*

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Attorney General v. Covington & Burling—The United States District Court for the District of Columbia held that although the attorney-client privilege exists within the context of the Foreign Agents Registration Act, the court will determine by an *in camera* inspection the confidentiality of particular documents.

INTRODUCTION

The complex dealings inherent in international business transactions have given rise to a problem faced by all nations: distinguishing between the business and political transactions of a government. A corollary problem is the proper understanding and classification of foreign agents—those who represent governments during these transactions.

The United States, while recognizing the need to protect the public from the dangers which might be engendered by covert, undisclosed agents, has at the same time sought to avoid allowing unwarranted fears to interfere with the crucial activities of foreign agents. The proper balance was thought to be found in the Foreign Agents Registration Act of 1938[1] [hereinafter referred to as Act]. "The Act is intended to protect the interest of the United States by requiring complete disclosure by persons acting for or in the interests of foreign principals where their activities are political in nature or border on the political."[2] Since its inception, however, and due in part to numerous amendments to the Act, there has been confusion as to who must actually register, what records they must keep, and to whom they are to be disclosed.

I. BACKGROUND

Covington & Burling [hereinafter referred to as C&B] is a Washington, D.C. law firm which registered pursuant to the Act in 1967 as an agent for the Republic of Guinea on a project to exploit its bauxite resources.[3] This arrangement, in great part, entailed negotiations with foreign corporations interested in mining the bauxite and the negotiation of loans from the World Bank and from various developmental agencies and domestic banks.[4] C&B also advised Guinea on various contract claims arising out

1. 22 U.S.C. §§ 611-21 (1970).

2. H.R. REP. No. 1470, 89th Cong. 2d Sess. 2 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2398.

3. Attorney Gen. v. Covington & Burling, 411 F. Supp. 371, 372 (D.D.C. 1976).

4. *Id.*

of bauxite transactions, and represented it in a New York State court in a contract dispute regarding Guinea's exhibit at the 1964 World's Fair.

In January 1975, the Justice Department, pursuant to section 615 of the Act,[5] sought review of the records kept by the firm concerning its representation of Guinea.[6] The firm was willing to divulge only ninety-five percent of the requested records. Approximately 1,000 pages were withheld as confidential communications protected by the attorney-client privilege.[7] The documents were acknowledged to have related to "nearly every area in which the firm [had] assisted Guinea."[8] The Attorney General requested a mandatory injunction ordering the firm to allow the Justice Department to examine the withheld records.[9] The United States District Court for the District of Columbia in *Attorney General v. Covington & Burling*[10] examined the issue of whether the Act recognizes an attorney-client privilege. It held that the privilege exists under the Act, but the court is to decide, after an *in camera* inspection, which documents are to remain confidential.

II. The Attorney-Client Privilege

The concept of the attorney-client privilege has changed greatly as society's priorities have changed. The original theory supporting the privilege was "the consideration for the oath and the honor of the attorney rather than for the apprehensions of his client."[11] By the end of the eighteenth century, this theory had been repudiated by the rationale that the "judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy, nor was there any moral delinquency . . . in breaking one's pledge under force of law."[12] From these divergent views has arisen the present theory, which combines justice and pragmatism. According to this concept, the disadvantages inherent in

5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 371.
11. 8 Wigmore on Evidence § 2290 (McNaughten rev. ed. 1961) [hereinafter cited as Wigmore]. The oath referred to is the pledge of secrecy given by the attorney to his client.
12. *Id.*

restricting the court's access to all pertinent information are outweighed by the benefits to justice which an open interchange between client and attorney will foster.[13] The doctrine recognizes the apprehension with which a client normally approaches his legal advisor,[14] and seeks to alleviate it.[15]

The general rule today is that the privilege applies to communications made during any consultation for legal advice, regardless of whether litigation is pending or an actual controversy exists.[16] The courts allow the privilege to exist because of the positive effect it is deemed to have on the orderly and efficient administration of justice.[17] Nevertheless, the extensive abuses made possible by the extension of the privilege have caused the courts to apply the privilege strictly.[18]

As in the instant case, courts have often found it necessary to distinguish legal matters from essentially business-oriented services. Business advice given by a lawyer is not a strictly legal matter, and is not privileged.[19] "The mere fact that a person is an attorney does not render as privileged everything he does for and with a client."[20] A recent demarcation of the privilege was

13. 411 F. Supp. at 373.

14. 8 WIGMORE, *supra* note 11.

15. The converse consideration is that due to the attachments and loyalties that develop between attorney and client, it is unreasonable to expect a lawyer to divulge his patron's closely held confidences. MCCORMICK ON EVIDENCE § 87 (2d ed. E. Creary 1972).

16. 8 WIGMORE, *supra* note 11.

17. The presumption is that if the client is free to communicate frankly with his attorney, the attorney will be able to render the soundest legal advice which would lead to a "just resolution" of the dispute. *See* Fischer v. United States, 425 U.S. 391, 403 (1976); 8 WIGMORE, *supra* note 11, at § 2290 *et seq.*; MCCORMICK ON EVIDENCE § 87 (2d ed. E. Creary 1972).

18. *See, e.g.*, United States v. United Shoe Mach. Corp., 289 F. Supp. 357 (D. Mass. 1970). This antitrust action precipitated claims of the attorney-client privilege by various in-house and outside attorneys for the corporate defendant. In brief, the court allowed the privilege as to all the documents in question, except those prepared by the patent department. The decision enumerated standards by which to determine the applicability of the privilege. It emphasized the element of confidence between the parties and the legal posture of both the party offering the advice and of the advice being sought; the analysis lay the groundwork for painstaking attempts to classify situations within the fine categories delineated, and often has led to very limited allowances of the privilege. *Id.* at 358-59. *See In re* Horowitz, 482 F.2d 72 (2d Cir. 1973); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963).

19. *In re* a Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029 (S.D.N.Y. 1975).

20. United States v. Bartone, 400 F.2d 459, 461 (6th Cir. 1968). Therefore, ministerial and clerical services performed by an attorney are not privileged. *Id.* Uncomplicated real estate dealings do not fall within the scope of the privilege, Pollack v. United States, 202 F.2d 28 (5th Cir. 1953), nor do activities done in the capacity of an agent having a power of attorney, Banks v. United States, 204 F.2d 666 (8th Cir. 1953). For example, in Under-

enunciated in a decision arising out of the International Business Machines antitrust litigation.[21] It was there held that the privilege does not attach to communications concerning company policy, including those regarding the settlement and negotiation of contracts.[22]

A further limitation on the scope of the privilege is particularly relevant to the field of international law. A document which does not reveal confidential information,[23] or which is intended by its character to be transmitted to a third party without legal approval,[24] is not a privileged communication.[25] Related to this limitation is the concept that the privilege extends only to matters communicated to an attorney in professional confidence. Therefore, the identity of a client, the fact that a person is a client, and certain basic information showing the nature of the relationship are not generally items of information which an attorney may refuse to disclose.[26] It might be contended that since a foreign corporation doing business abroad must apprise itself of the laws of the host nation, the existence of a statute such as the Foreign Agents Registration Act gives it notice that the type of information requested by the Act is "intended to be seen by third parties" and therefore cannot be privileged.

The existence of the attorney client privilege, despite the

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water Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546 (D.D.C. 1970), a trade secret case, an attorney was called upon to testify regarding work done in the preparation of patent applications for his client. The court held that such activities do not constitute legal advice, and are not privileged. *See also* Georgia Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956). There, Judge Kaufman stated: "[C]ommunications dealing exclusively with the solicitation or giving of business advice, or with the technical engineering aspects of patent procurement or with any other matters which may as easily be handled by laymen are not privileged." *Id.* at 464.

21. United States v. International Business Machs. Corp., 66 F.R.D. 206 (S.D.N.Y. 1974).

22. *Id.* at 214.

23. *Id.*

24. *Id.* at 215.

25. Many cases dealing with the element of confidentiality have arisen out of disputes between attorneys and the Internal Revenue Service. Best known is Colton v. United States, 306 F.2d 633 (2d Cir. 1962), in which the court held that an order demanding the production of retained income tax returns does not violate the attorney-client privilege, since by their nature, tax returns are meant to be seen by a third party and are therefore not confidential. *Id.* at 638. Similar conclusions have been reached with respect to bank deposit slips and checks. *See* Harris v. United States, 413 F.2d 316 (9th Cir. 1969).

26. 2 WEINSTEIN'S EVIDENCE § 503(a)(4)[02] (1976). Weinstein states the general rule to be that the name of a client is not confidential. *Id.* However, United States v. Lee, 107 F. 702 (E.D.N.Y. 1901), and *In re* Kaplan, 8 N.Y.2d 214, 168 N.E.2d 660, 203 N.Y.S.2d 838 (1960), are cited as *contra* to the general rule. *Id.*

narrow boundaries within which it has been confined, has long been and continues to be attacked.[27] Wigmore states:

> [T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[28]

McCormick is even stronger in his criticism. "If one were legislating for a new commonwealth, without history or customs, it might be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice."[29] More recently, the United States Supreme Court reiterated these sentiments by stating that "since the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose."[30]

III. Attorney-Client Privilege under the Act

As previously mentioned,[31] the growing political activities of foreign powers in the United States[32] led Congress to enact the Foreign Agents Registration Act.[33] The major problem that had arisen under the Act was determining whether a particular person

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27. One of the first to attack the privilege was Jeremy Bentham. He argued that only if the entire truth were divulged could justice be done. His criticism was in part based upon the view that the privilege protected no one other than the guilty party. Bentham, A Treatise on Judicial Evidence 246-47 (1825).

28. 8 Wigmore, *supra* note 11, at § 2291.

29. McCormick on Evidence § 87 (2d ed. E. Creary 1972).

30. Fischer v. United States, 425 U.S. 391, 403 (1976). This case involved a transfer of tax returns from defendant's accountants to his attorneys. The attorneys refused to turn them over to the Internal Revenue Service pursuant to criminal and civil investigations being conducted by the Service into the affairs of the defendant. The court held that no privilege exists and ordered the documents produced. *Id.*

31. *See* text accompanying notes 1 & 2 *supra*.

32. *See* H.R. Rep. No. 1381, 75th Cong., 1st Sess. (1937).

33. The Act requires that every "agent of a foreign principal" must file a complete registration statement with the Attorney General, unless exempted under section 613. 22 U.S.C. § 611(c) (1970). The registration statement must disclose the particulars of the agent's activities for his foreign principals. The agent must also file copies of any political propaganda which he publicizes on behalf of a foreign principal. *Id.* § 614. Congress empowered the Attorney General to require that certain records relating to activities subject to disclosure under sections 612 and 614 be kept by the agent, and that the Attorney General's delegate be permitted to inspect the records. *Id.* § 615.

was a foreign agent.[34] In *Attorney General v. Covington & Burling*,[35] a new problem arose—whether the traditional attorney-client privilege protected all confidential communications between a lawyer who is a foreign agent and his employer. The court found two policies involved when the attorney-client privilege is claimed under the Act. One purpose of the Act is to enable the public and the federal government to learn which foreign interests have a "substantial effect on American life through agents operating in this country." But the Act also seeks to accomplish this objective without unduly burdening these foreign agents.[36] The compromise solution which the court reached reflects the difficulty in reconciling these two policies.

Judge Sirica's decision appears to have been based upon an erroneous premise. After reviewing the Act, he concluded that "it is somewhat difficult to see how the values that the attorney-client privilege is designed to protect could be in danger here"[37] since the information sought by the government would be revealed to only a few Justice Department agents and the chance of "leaks" to the public was slight. For some unexplained reason, however, the court concluded that although under the same circumstances the attorney-client privilege would not protect a domestic principal, it would protect a foreign principal.[38] "[H]owever unreasonable it may appear to be, foreign interests might well doubt that officials of the Justice Department would or could keep the information disclosed to them confidential."[39]

This reasoning seems tenuous. It has consistently been held that in cases of national security and foreign policy, traditional rights and privileges may be subordinated to the national interests.[40] The United States Supreme Court has stated that "to preserve its independence, and give security against foreign aggression and encroachment, it is the highest duty of every nation, and

34. *See* Rabinowitz v. Kennedy, 376 U.S. 605 (1964); Attorney Gen. v. Irish N. Aid Comm., 346 F. Supp. 1384 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972).

35. 411 F. Supp. at 371.

36. *Id.* at 376.

37. *Id.* at 373.

38. Because there is no express provision in the Act which deters an official in the Justice Department from "leaking" information, the court's distinction between a so-called public disclosure and disclosure to the officials of the Justice Department is particularly curious.

39. 411 F. Supp. at 374.

40. Attorney Gen. v. Irish N. Aid Comm., 346 F. Supp. 1384, 1390 (S.D.N.Y. 1972).

to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come . . . ."[41]

In *Attorney General v. Irish Northern Aid Committee*,[42] the United States District Court for the Southern District of New York stated that under the Act, a foreign agent must disclose membership information. Although such information is usually protected by the first amendment,[43] when this right was balanced against the United States government's interest supporting disclosure under the Act, the balance tilted strongly in favor of the government. "The governmental interest may fairly be said to outweigh any possible infringement of the First Amendment rights of members or contributors."[44] The basis for the strong government interest was the "indisputable power of the Government to conduct its foreign relations and to provide for the national defense," the court added.[45] It therefore appears that the rights of foreign principals should be narrowly construed.

These cases directly apply to the instant case. There appears to be no reason why, if an agent of a domestic principal is required to make complete disclosure, that an agent of a foreign principal would not be required to do so under similar circumstances. There should have been a complete disclosure by C&B in this case unless the withheld documents fell within one of the two statutory exemptions.[46]

Section 613(g) exempts from filing "any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States."[47] Because this subsection limits the traditional attorney-client privilege[48] to communications made in contemplation of litigation,[49] it might not cover all communications that were made in

41. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 96 (1961), *quoting* Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

42. 346 F. Supp. at 1384.

43. NAACP v. Alabama, 357 U.S. 449 (1958).

44. 346 F. Supp. at 1391.

45. *Id.* at 1390.

46. It is impossible to ascertain whether or not C&B was entitled to the statutory exemptions since the firm was willing to have it assumed for the purposes of this case that it was not. 411 F. Supp. 371, 372 n.1.

47. 22 U.S.C. § 613(g) (1970).

48. 8 WIGMORE, *supra* note 11, at § 2294.

49. 411 F. Supp. at 374.

the instant case.

The other filing exemption is found in Section 613(d). This subsection exempts "any person engaging or agreeing to engage only: (1) in private and non-political activities in furtherance of a bona fide trade or commerce of such foreign principal or (2) in other activities not serving predominantly a foreign interest . . . ."[50] However, the court held that this section applies when the agent is engaged solely in exempt activities.[51] If he engages in any non-exempt activities complete disclosure is required, *i.e.*, both the non-exempt and the otherwise exempt activities would be subject to disclosure.[52]

Concluding that only limited exemptions are available under sections 613(d) and (g), the court went on to inquire whether the attorney-client privilage may be applied to foreign agents despite the disclosure provision of section 615. That section states, *inter alia*:

> Every agent of a foreign principal registered under this act shall keep and preserve while he is an agent of a foreign principal such books of account and other records with respect to all his activities, the disclosure of which is required under the provisions of this act, in accordance with such business and accounting practices as the Attorney General, having due regard for the national security and the public interest, may by regulation prescribe as necessary or appropriate for the enforcement of the provisions of this act. . . . Until regulations are in effect under this section every agent of a foreign principal shall keep books of account and shall preserve all written records with respect to his activities. Such books and records shall be open at all reasonable times to the inspection of any official charged with the enforcement of this Act.[53]

By regulation, the Attorney General has ordered that an agent keep "*all* correspondence [and] memoranda . . . relating to the registrant's activities on behalf of or in the interest of any of his foreign principals."[54]

Because section 615 requires that the agent preserve all written records with respect to his activities, the court found no con-

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50. 22 U.S.C. § 613(d) (1970).
51. 411 F. Supp. at 374.
52. *Id.*
53. 22 U.S.C. § 615 (1970).
54. 28 C.F.R. § 5.500(a)(1) (1975) (emphasis added).

gressional intent to exclude confidential communications.[55] The court also concluded that the statute was drafted without considering the attorney-client privilege.[56] The court, however, appears to have overlooked a 1966 House of Representatives report[57] which implied that the attorney-client privilege was intended to operate only when it involved an activity exempted by section 613(d). According to that report, no exemption would exist if the foreign agent engaged in any non-exempt activity. Nevertheless, the court decided without much difficulty that the records of the confidential communications between a foreign principal and its agent-attorney are included under section 615 and the regulations established by the Attorney General.[58] On the question of disclosure, the court evenly weighed the "purposes" of the Act, *i.e.*, it balanced the government's interest in ascertaining the effect on American life of agents operating in this country, against the desire to accomplish this without unnecessarily burdening the agents.[59]

In light of *Attorney General v. Irish Northern Aid Committee*[60] and the 1966 House Report[61] this reasoning must be rejected. Because of the dominant governmental interest in this area it would be more logical to conclude that the statutory exemptions exist to lift some of the burden from the agents. However, it does not follow that because of the existence of these statutory exemptions other non-statutory exemptions may be inferred. On the contrary, because of the dominant governmental interest and the intent of Congress, the statutory exemptions should be deemed to be exclusive.[62]

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55. 411 F. Supp. at 375-76.

56. *Id.*

57. H.R. REP. No. 1470, *supra* note 2. The House Report states: "A specific exemption for attorneys for representation of foreign clients in the courts and before administrative agencies is contained in [section 613(g)], but the day-to-day, routine activities of attorneys in advising and counseling with foreign clients will continue to be exempt under this section. When advice is given or assistance is rendered with the intent to influence government policy, the agency is engaged in political activity and the exemption will not apply." *Id.* at 9-10, U.S. CODE CONG. & AD. NEWS at 2405.

58. 411 F. Supp. at 376. The relevant regulations are found at 28 C.F.R. § 5.500(a)(1) (1975).

59. 411 F. Supp. at 376. The court derives the second purpose from the fact that exemptions exist in the statute. *Id.*

60. 346 F. Supp. 1384 (S.D.N.Y. 1972).

61. H.R. REP. No. 1470, *supra* note 2.

62. A major area which is beyond the scope of this comment is the application of the Bill of Rights and other constitutional guarantees to agents of foreign principals. This issue was raised but not discussed in United States v. Finance Comm. to Re-Elect the

CONCLUSION

The *Covington & Burling* holding establishes a dangerous precedent: the allowance of an *in camera* inspection creates the possibility that documents essential to vital government interests will not be revealed. Such a result is contrary to the motivation underlying the enactment of the Foreign Agents Registration Act, that is, to create a level of uniformity by which the government may gain access to the records of foreign agents.

It is unlikely that the documents involved in this case could have attained the status of legal communications. Although the Act seems to recognize an attorney-client privilege for exemption purposes, the privilege cannot be claimed as to section 615 records, which were never intended to encompass substantively legal matters in the first place. Therefore, the court created great confusion by implying that the firm could have asserted the attorney-client privilege with respect to these documents. Where the law is clear as to the scope of a privilege, the public should not be invited to challenge the courts at every turn. Furthermore, in unnecessarily subordinating the interest of the federal government, the court has failed to heed Judge Learned Hand's caveat: "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest: it can be justified only when the opposed private interest is supreme."[63]

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President, 507 F.2d 1194, 1201 (D.C. Cir. 1974).

63. McMann v. Securities and Exch. Comm'n, 87 F.2d 377 (2d Cir. 1937).