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Title VII - Litigation Concerning Sources of Evidence

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TITLE VII—LITIGATION CONCERNING SOURCES OF EVIDENCE

I. INTRODUCTION

There are two operative provisions of title VII, both of which mitigate previous judicially imposed restrictions on governmental collection and presentation of evidence in "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States."[1] The first purports to set aside the Supreme Court's holding in the 1968 case of *Alderman v. United States,*[2] in which the Court held that, in cases involving unlawful electronic surveillance, the government must make full disclosure to the defendant of all records in its possession which contain any of his conversation or involving conversations which took place on premises owned by him.[3] In so ruling, the Court specifically rejected the Government's contention that once a defendant has established his standing[4] to contest admission of the evidence and the illegality[5] of the Government's action, a court should then screen the Government's files in *camera* and deliver to the defendant only material which might prove "arguably relevant" in establishing the causal relationship[6] between the unlawful surveillance and the evidence being challenged. The purpose of the second provision is to establish a rule of law that no court may consider any claim that evidence offered to prove a crime is inadmissible on the ground that it was obtained by the exploitation of an unlawful act[7] if the alleged unlawful act occurred more than five years prior to

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[1] Organized Crime Control Act of 1970, 18 U.S.C.A. § 3504(a)(2), (3) (Supp. 1971).
[2] 394 U.S. 165 (1969).
[3] *Id.* at 180–85.
[4] The basis for this requirement is the rule in Jones v. United States, 362 U.S. 257, 261 (1960), that to qualify as a "person aggrieved" by an unlawful search and seizure one must be the victim of the search and seizure, or one against whom the search was directed.
[5] The defendant must establish that a Government agent committed a violation of the law for which exclusion of the evidence thereby obtained is considered a proper remedy, *e.g.*, an unreasonable search and seizure. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).
[6] The defendant must establish that the evidence he seeks to suppress is either the "fruits" of the violation, Wong Sun v. United States, 371 U.S. 471, 484 (1963); or something "come at by the exploitation" of the violation, United States v. Wade, 388 U.S. 218, 241 (1967); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
[7] 18 U.S.C.A. § 3504(b) (Supp. 1971), provides:

> As used in this section 'unlawful act' means any act involving the use of any electronic, mechanical, or other device (as defined in § 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

the crime being proved.[8] Title VII is one of the more controversial sections of the Act.[9] These provisions represent congressional unwillingness to abide the protracted procedural delays which have resulted primarily from motions to suppress evidence obtained by the Government via alleged illegal electronic surveillance.[10] The Senate Committee Report on S. 30 noted that when an organized crime leader is brought into court, an alternative to tampering with the witnesses as a means of avoiding or delaying prosecution is to challenge the admissibility of the evidence.[11] Motions to suppress evidence generally entail a long and costly process, "especially so in cases involving alleged illegal electronic surveillance."[12] The Senate Committee referred to a "procedural crisis" caused by the filing of motions to suppress, which was worsened by the *Alderman* requirement for full disclosure.[13] Fur-

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[8] 18 U.S.C.A. § 3504(a)(3) (Supp. 1971). *E.g.*, in a case involving a defendant being tried for trafficking in heroin, a 1962 illegal surveillance would be susceptible to challenge as the source of evidence establishing such criminal transactions occurring in 1966 at defendant's trial in 1969. The "event" is the 1966 transactions, not the 1969 trial. However, the same surveillance would be immunized from challenge if the transactions being proved had taken place in 1968. As a practical matter this section will be limited in its application since it encompasses only those "unlawful acts" of the Government taking place prior to June 19, 1968 (date of enactment of the federal wiretapping and electronic surveillance law, 18 U.S.C. §§ 2510-20 (Supp. IV, 1968)). Disclosure after this date will be mandated by 18 U.S.C. § 2518 (Supp. IV, 1968), added by title III, Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 218. Section 2518(10)(a) gives the trial judge discretion as to the disclosure of alleged unlawfully intercepted communications to the defendant. (The provision is also in conflict with the Supreme Court's decision in *Alderman*).

[9] The three dissenting members of the House Committee on the Judiciary included it among what they termed the four "particularly egregious" titles of the Act, and called title VII an "invidious assault" on the fourth amendment. H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 182 (1970) (hereinafter cited as HOUSE REPORT).

[10] As an example of such delays the Senate Committee cited the *Alderman* case itself. The district court on rehearing, after full disclosure of the Government's surveillance logs had been made to defendant and 2 1/2 days of defense interrogations of numerous FBI agents and supervisors connected with surveillance had proceeded, concluded that there was not a single overheard conversation which Alderman had standing to challenge, and that as to those for which his co-defendant Alderisio had standing: "There is absolutely no relevancy in any of the material from any of the logs of the electronic surveillance to any evidence offered at the trial of this case." S. REP. No. 91-617, 91st Cong., 1st Sess. 64 (1969) (hereinafter cited as SENATE REPORT). In the case of Mrkonjic-Ruzic v. United States, 394 U.S. 454 (1969), the defendant had fallen into an illegal electronic surveillance five years before the date of his crime and was overheard participating in one brief conversation. According to the Solicitor General,

> It is apparent from an examination of the one and a half line surveillance log entry reflecting that conversation that the overhearing of the conversation could not possibly have provided evidence against the petitioner. It would not take a trial judge 5 minutes to make that determination.

SENATE REPORT 68. However, the Court refused to accept the Solicitor General's argument and remanded the case to the district court for *Alderman* hearings.

[11] SENATE REPORT 62.

[12] *Id.* 63. In this regard the Supreme Court said in Desist v. United States, 394 U.S. 244, 251 (1969):

> [T]he determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weighty burden on any court.

Of course, the curtailment of illegal electronic surveillance would avoid this problem.

[13] SENATE REPORT 64.

thermore, where such disclosure is made, it is claimed that several undesirable results are possible, including the chilling effect it may have on other pending investigations and prosecutions, the damage which the reputations of innocent third parties may suffer, and the difficulty it may create in recruitment of confidential informants.[14]

Thus, Congress has rationalized that the provisions of title VII are a means of protecting the lives of informants and Government agents, avoiding unjust harm to the reputations of third persons, and protecting legal proceedings against the "delay, congestion, expense, and distraction" caused by the litigation of numerous, sometimes tenuous, allegations that evidence should be suppressed.[15]

II. CONSTITUTIONAL CONSIDERATIONS

A. The Legislative Overruling of Alderman

Not surprisingly, the Attorney General viewed the Court's decision in *Alderman* as "a great disappointment to the Department."[16] A major criticism of the decision in the opinion of the Justice Department was that no provision was made for any "threshold" disclosure criterion.[17] The claimed need for threshold criteria of disclosure is based on the Justice Department's lack of confidence in the effectiveness of court protective orders to safeguard the confidentiality of information not relevant to the defendant's case, a feeling which was shared by the Senate Committee.[18] Congress saw no constitutional obstacle to overruling

[14] *Id.* 65.

[15] *Id.* 62-63.

[16] SENATE REPORT 66.

[17] *Id.* 67. Apparently this phrase refers to some minimum standard of relevance to a causal relationship between the unlawful surveillance and the evidence being challenged which the defendant would be required to prove before a court could order disclosure to him of surveillance logs. This view was also articulated by Mr. Justice Harlan in his separate opinion:

> [I]t is not difficult to imagine cases in which the danger of unauthorized disclosure of important information would clearly outweigh the risk that an error may be made by the trial judge in determining whether a particular conversation is arguably relevant to the pending prosecution. . . . Yet though the Court itself recognizes that 'the need for adversary inquiry is increased by the complexity of the issues presented for adjudication,' . . . it nevertheless leaves no room for an informed decision by the trial judge that the risk of error on the facts of a given case is insubstantial.

394 U.S. at 199-200 (Harlan, J., concurring and dissenting).

[18] National security information dealing with surveillance of a foreign embassy was disclosed in a December 2, 1966 *Washington Post* article despite a protective order issued by the District Court for the District of Columbia. *See* 115 CONG. REC. S 6095 (daily ed., June 9, 1969). As the Senate Committee said, "Again, the wiretap transcripts had remained confidential in the Government's hands for over five years until they were produced in court, supposedly in secret, only to appear in the newspaper three weeks later." SENATE REPORT 69.

Alderman, calling the decision an exercise of the Supreme Court's supervisory jurisdiction over the federal courts, not a constitutional interpretation.[19] However, such reasoning does not appear convincing in light of the Court's rulings in this area. First, it will be recalled that in order to obtain disclosure, the defendant must show in his standing that the Government's action was illegal.[20] In *Katz v. United States,*[21] the Court set strict standards for the Government to follow in cases of electronic surveillance. Concerning the legality of electronic eavesdropping, the Court stated that "bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police'. . . . The Government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case."[22] In supporting its ruling for full disclosure by the Government to the defendant of all electronic surveillance logs containing the defendant's conversation or made on his premises where such surveillance was illegal, the Court said in *Alderman:*

> Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the *scrutiny which the Fourth Amendment exclusionary rule demands.* (Emphasis added). [23]

Thus the Court's holding in *Katz* may fairly be read as a broad

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[19] SENATE REPORT 69. In arguing for such an interpretation of *Alderman,* Senator McClellan noted that it is "a basic rule of practice" of the Court to avoid resting decisions on constitutional grounds when they can be based on such grounds as statutory interpretation or the supervisory power. He cited Peters v. Hobby, 349 U.S. 331 (1955), as an example. McClellan, *The Organized Crime Control Act,* 46 NOTRE DAME LAW. 55, 123 (1970). However, this particular example overlooks the fact that in *Peters,* the Court granted relief to the petitioner prior to reaching his constitutional claims. Thus, whether or not such relief was granted on constitutional grounds made no difference in that case. This contrasts quite sharply to the situation in *Alderman* where the issues in contention concerned procedural requirements dictated solely by the fourth amendment. To argue that the decision regarding the method of disclosure was based on the supervisory power would sharply curtail the Court's holding. *See* 394 U.S. at 184.

[20] *See* notes 4 and 5 *supra* and accompanying text.

[21] 389 U.S. 347 (1967).

[22] *Id.* at 358-59.

[23] 394 U.S. at 184. The Court continued:

> It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a chance the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant. *Id.*

proscription against Government electronic surveillance directed against private citizens without prior judicial mandate. And in *Alderman,* which involved such unlawful surveillance, the Court's specific mention of the rigorous standards imposed by the exclusionary rule served to reaffirm its concern for the fourth amendment rights of individuals in this area. In the face of such pronouncements by the Court concerning the area of illegal electronic surveillance by the Government, the contention that the Court's disclosure rule in *Alderman* was not constitutionally binding but simply an exercise of its jurisdiction over federal courts appears weak indeed.[24]

B. Proscribing Certain Motions to Suppress

A second major criticism of the *Alderman* disclosure rule was that it contained no provision for special consideration of illegal police conduct occurring long before the event being proved. The Justice Department felt that the passage of a number of years would make the connection of police illegality and the commission of a later crime almost nonexistent.[25] Thus, the Department felt such a provision was warranted to control the increasingly "complex, lengthy, confusing, and unreliable" litigation over whether evidence is "tainted."[26] As noted, this provision of title VII prohibits a court from entertaining motions to suppress evidence on the ground that such evidence was obtained by the exploitation of an unlawful act if the act in question occurred more than five years prior to the crime being proved.[27]

[24] However, whether *Alderman* itself will remain good authority for long is an open question. The case was decided by a sharply divided Court in a five to three decision; moreover, two members of the majority, Mr. Chief Justice Warren and Mr. Justice Fortas, have since been replaced by Mr. Chief Justice Burger and Mr. Justice Blackmun, both of whom are generally considered more conservative than their predecessors. Thus it appears highly unlikely that the Government would accept any adverse ruling on the disclosure provision of title VII without seeking review by the Supreme Court, with a reasonable probability of ultimately prevailing. Moreover, there were indications as early as 1969 that the Justice Department would eventually get all that it asked in *Alderman.* N.Y. Times, March 25, 1969, at 26, col. 1. The basis for such speculation was the concurring opinion of Mr. Justice Stewart in Giordano v. United States, 394 U.S. 310 (1969), in which he wrote:

> As we made explicit in *Alderman, Butenko,* and *Ivanov,* the requirement that certain products of governmental electronic surveillance be turned over to defense counsel was expressly limited to situations where the surveillance had violated the Fourth Amendment. We did not decide in those cases, and we do not decide in these, that any of the surveillance did violate the Fourth Amendment. Instead, we have left that threshold question for the District Courts to decide in all these cases. Moreover, we did not in *Alderman, Butenko,* or *Ivanov,* and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings.

349 U.S. at 313-14.

[25] SENATE REPORT 68.

[26] *Id.*

[27] 18 U.S.C.A. § 3504(a)(3) (Supp. 1971). *Supra* note 8.

In effect, a statute of limitations would run on constitutional defenses thereby allowing the Government, after waiting five years, to use evidence obtained through unlawful electronic surveillance. The Government claims that as a practical matter evidence obtained five years before an event provides—as to the offense charged—only general information usually duplicated by similar information from several independent sources, particularly in the case of organized crime.[28] Claiming the five year period was selected out of an abundance of caution, the Justice Department cited a Department survey indicating that after a year or two the probability of finding a causal link between the illegal electronic surveillance and evidence of a later offense was "virtually nonexistent."[29] Congress, in considering the constitutionality of this provision, apparently acquiesced in the Justice Department's assertion that the proposal fell within the sphere of the doctrine of "attenuation" as established in *Nardone v. United States*.[30] In defense of its position, the Department argued that in the case of an "unlawful act" the Government might show sufficient attenuation, rather than proving an independent source of the information,[31] to avoid the application of the exclusionary rule. Thus, acknowledging the attenuation doctrine and accepting the Department's claim that the probability of establishing a causal link between information obtained through illicit electronic surveillance and the Government's proof is highly improbable after two years, Congress has acted to abrogate the right of a defendant to even raise this question in cases where the illegal search preceded the event by more than five years. However, congressional reasoning on this point will not bear scrutiny. In announcing the doctrine of "attenuation," the Court said that the causal connection between information obtained through unlawful electronic surveillance and the Government's proof "may have become so attenuated as to dissipate the taint."[32] Consistent with its holding that unlawful electronic surveillance constitutes an unreasonable

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[28] HOUSE REPORT 93. Of course, if this is true, the question is raised as to why the Government continues to use illegal electronic surveillance as extensively as it does in these cases.

[29] *Id.*

[30] 308 U.S. 338 (1939). The doctrine of "attenuation" recognizes that even where challenged evidence does not have an "independent source" from illegal surveillance, it still might be admissible. The Court expressed the doctrine thus:

> Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

Id. at 341.

[31] *See* Silverthorne v. United States, 251 U.S. 385 (1920).

[32] *Supra* note 30.

search *per se*,[33] the Court has decided questions involving the "attenuation" doctrine on a case by case basis.[34] But Congress, in passing title VII, has in effect assumed a judicial function and decided that *all* instances of unlawful electronic surveillance occurring five years or more prior to an event being proved will be conclusively regarded as falling within the scope of the doctrine. While, practically speaking, it may be true that in a large number of cases the five year lapse will in fact be sufficient to "dissipate the taint," it is easy to point to several areas, particularly where criminal activity has been long established, where such a conclusion is not at all apparent.[35] Yet with its passage of title VII, Congress has denied the right of defendants to even raise this question in certain situations. Moreover, it is likely that one result of title VII will be to encourage further unlawful electronic surveillance, a practice which the exclusionary rule sought to deter.[36] Thus, it is difficult to imagine the Supreme Court sanctioning this rationale under the searching scrutiny which the exclusionary rule demands.[37] As the dissenting members of the House Committee on the Judiciary put it:

> It may be reasonable to preclude the commencing of litigation after a given period of time—either because the defendant should not be forced to answer, nor the courts to hear, charges which can only be substantiated by evidence weakened by time, or because the plaintiff has been negligent in failing to bring suit earlier. It would be a novel application of this logic, however, to allow the defendant to be brought to trial and at the same time to hamper his defense by precluding him from raising constitutional issues which might otherwise be available to him.[38]

There is one further cause for concern regarding title VII.

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[33] Katz v. United States, 389 U.S. 347, 357 (1967).

[34] *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939).

[35] *E.g.*, such activities as income tax evasion, syndicated gambling, or trafficking in narcotics which may have been carried on for an extended period. In such cases, where there is traditionally a lack of documentary evidence, it may be quite likely that there exists a strong causal relationship between the unlawful electronic surveillance and the evidence offered to prove criminal activity occurring five years later.

[36] Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 222 (1968).

[37] Concerning the rigorous standards required by the exclusionary rule, the Court said in Katz v. United States, 389 U.S. 347, 357 (1967):

> 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes' . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

See also text accompanying note 22 *supra*.

[38] HOUSE REPORT 185, quoting the *Report of the Association of the Bar of the City of New York, Organized Crime Control Act of 1969*, at 24.

Although its provisions were supposedly enacted to strengthen the Government's evidence-gathering process in dealing with "organized criminal activities," nowhere in title VII is there any provision which would tend to reasonably limit its application to such activity.[39] Moreover, in view of the Government's expanded view of its authority to engage in electronic surveillance,[40] the fear has been expressed that title VII may be used to stifle political dissent and protest activities.[41]

III. CONCLUSION

Title VII appears to be an unconstitutional abridgment of the exclusionary rule, an "essential ingredient of the Fourth Amendment."[42] Congress' rationale for overruling the full disclosure rule of *Alderman* as representing merely an exercise of the Supreme Court's supervisory jurisdiction over the federal courts is unte-

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[39] *Compare* the provision of title VI, 18 U.S.C.A. § 3503(a) (Supp. 1971), pertaining to certification by the Attorney General that the proceeding is directed against one believed to have participated in an organized criminal activity. Such certification must accompany any government motion to invoke the provisions of title VI.

[40] In a memorandum submitted to the court in United States v. Dellinger, No. 69 Cr. 180 (N.D. Ill., filed Mar. 20, 1969), the Government maintained: "[T]he President, through the Attorney General, has the constitutional power to authorize electronic surveillance . . . to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to use unlawful means to attack and subvert the existing structure of government." *Hearings on S. 30 Before the Subcomm. on Crim. Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 490 (1969). The Government still takes this position on electronic wiretapping of domestic groups. Recently, Judge Damon Keith ruled that the Attorney General does not have a right to order wiretaps without a court warrant in domestic cases on the ground of protecting national security. In United States v. Sinclair, No. 44375 (E.D. Mich., filed Oct. 7, 1969), a case involving an alleged conspiracy and the bombing of a CIA office in Ann Arbor, Judge Keith ruled that the Government had no probable cause to believe criminal activities were being plotted when tapping of defendants' phones began in 1969. He further ruled that the Government must immediately turn over its surveillance logs to defense counsel. Less than two weeks earlier, Judge Warren J. Ferguson in Los Angeles had made a similar ruling with respect to this theory. N.Y. Times, Jan. 25, 1971, at 19, col. 1. The Government appealed Judge Keith's ruling. The Sixth Circuit Court of Appeals phrased the crucial question, "where the Attorney General determines that certain wiretaps are 'necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government,' does his authorization render such wiretaps lawful without judicial review?" Answering this question in the negative, Judge Edwards held that neither title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. §§ 2510 et seq. (Supp. V, 1965-69), nor the President's powers to protect the nation against revolution, exempt the Executive Branch from fourth amendment warrant requirements in cases involving wiretapping of alleged domestic subversives. United States v. United States District Court, Eastern Michigan, 39 U.S.L.W. 2574 (6th Cir. Apr. 8, 1971). The Government has announced its intention to appeal this ruling to the Supreme Court. N.Y. Times, Apr. 28, 1971, at 26, col. 3.

[41] *Hearings on S. 30 Before the Subcomm. on Crim. Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 489 (1969). This could be accomplished by the use of evidence obtained from unlawful electronic surveillance of suspect domestic organizations in future proceedings where title VII could be invoked by the Government to deny the defendants' right to challenge the source of such evidence.

[42] Mapp v. Ohio, 367 U.S. 643, 651 (1961).

nable. The rule in substance secures rights for defendants which the Court has held required by the fourth amendment in light of the Government's practices of illegal electronic surveillance. However, the Court's holding in *Alderman* is now vulnerable due to the changed makeup of the high court bench, and it is reasonably probable that this provision of title VII could be upheld by the Court in subsequent proceedings.

Similarly, congressional justification of the five year cutoff for defendants challenging the admissibility of certain evidence cannot be squared with the Court's rulings on the doctrine of "attenuation." It is indeed difficult to imagine that the Court will uphold this provision abrogating a defendant's constitutional right based on a mere "probability" that the validity of his claim is "virtually nonexistent."

A further danger of title VII is the possibility of its use by the Government in a wide range of criminal cases, including those totally unconnected with organized crime as that term is normally understood.