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FEB 18 1975

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*our 2/18/75
@ 3:40pm*

Use of Material Obtained through Electronic Surveillance.

This is in response to your memorandum of November 5, forwarding to us correspondence between the IRS and your Division. In its letter of October 17, 1974, the IRS asks that OLC provide an opinion or concur in that furnished by the Criminal Division on certain matters relating to electronic surveillance.

The correspondence, which goes back to 1971, concerns the interpretation of 18 U.S.C. 2517, as it relates to the use by IRS employees of information obtained through electronic surveillance. This provision (part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968) authorizes disclosure and use of intercepted wire or oral communications in various circumstances.

Under Title III a detailed procedure is prescribed for obtaining judicial approval for electronic surveillance. The application for a judicial order must be authorized by the Attorney General or a designated Assistant Attorney General. 18 U.S.C. 2516(1). Once court approval is obtained for the electronic surveillance, the necessary interception may be carried out by either the FBI or by a Federal agency having responsibility for the investigation of the offense for which the application is made. Title III is oriented principally toward investigation of criminal offenses, and those offenses for which electronic surveillance can be initiated are listed in the statute. 18 U.S.C. 2516(1).

The law assumes that applications for surveillance will be made by an "investigative or law enforcement officer." See 18 U.S.C. 2518(1)(a), 2518(7), and 2517(5). Reflecting

the basic scheme of Title III, the term "investigative or law enforcement officer" is defined in Title III as an officer "empowered by law to conduct investigations of or to make arrests for offenses" enumerated in Title III, and "any attorney authorized by law to participate in the prosecution of such offenses." 18 U.S.C. 2510(7).

The IRS asks in its October 17 letter for the views or concurrence of this Office on three questions. The first two concern the circumstances in which various categories of IRS agents can be considered law enforcement officers for the purposes of 18 U.S.C. 2517.^{1/} Difficult questions of construction are presented in trying to resolve this issue in the abstract.

The third question is whether the disclosure scheme of 18 U.S.C. 2517 ever permits intercepted information to be disclosed to a person who is not an "investigative or law enforcement officer," for the initiation of civil tax proceedings. We start our analysis with the third question since its answer may effectively moot the first two. If 18 U.S.C. 2517 does not restrict disclosure of intercepted information to law enforcement officers, then for present purposes it will not be necessary to spell out when IRS agents act as law enforcement officers and when they do not. In order to use such information in a civil action, IRS would not have to preserve a continuous chain of custody consisting solely of law enforcement officers, and the distinctions that IRS inquires about, based on a parsing of job descriptions, would no longer be crucial.

The answer to this question must be sought in the cryptic language of 18 U.S.C. 2517. In brief, 18 U.S.C. 2517 permits "an investigative or law enforcement officer" who has obtained intercepted information under the authority

^{1/}In the following discussion the term "law enforcement officer" is frequently used as shorthand for "investigative or law enforcement officer."

of Title III to disclose it to other law enforcement officers and also to use it "to the extent such use is appropriate to the proper performance of his official duties." 18 U.S.C. 2517(1) and (2). Furthermore, "any person" who has received such information may disclose it while testifying in "any proceeding" held under the authority of the United States. 18 U.S.C. 2517(3).

In correspondence with IRS, your Division has indicated that intercepted information may be used by persons other than law enforcement officers under the authority of 18 U.S.C. 2517. Admittedly, "[t]he Act is not as clear in some respects as it might be." United States v. Giordano, 416 U.S. 505, 515 (1974). However, for the reasons stated below we concur with your view.

First, it is clear that wiretap evidence obtained pursuant to judicial order in the context of a criminal offense is usable in civil actions. Congress amended Title III in 1970 (84 Stat. 947) for the very purpose, among others, of enabling wiretap evidence to be "employed in civil actions." H. Rep. No. 91-1549, U. S. Code Congressional & Adm. News 4007, 4036 (1970). To accomplish this, language limiting the use of intercepted material to criminal proceedings was stricken from 18 U.S.C. 2517(3) and replaced by general language making the material available in "any proceeding held under the authority of the United States." 18 U.S.C. 2517, note. Congress also directed in a policy statement that the amendment should "be liberally construed to effectuate its remedial purposes." 84 Stat. 947.^{2/} Title III should thus be construed, if possible, to permit the steps necessary to use intercepted material effectively in civil proceedings.

Section 2517 permits an interpretation consistent with that goal. Subsection (1) only authorizes disclosure from

^{2/} The direction has not been codified in 18 U.S.C. 2517. However, it appears in a note to 18 U.S.C. 1961, dealing with racketeer-influenced and corrupt organizations, to which the direction on construction is also applicable.

one "investigative or law enforcement officer" to another-- in the narrowly defined meaning of that term described above. 18 U.S.C. 2510(7). Subsection (2), however, goes beyond this, to permit the "use" of wiretap information by a law enforcement officer to the extent such use is appropriate to the proper performance of his "official duties." It is not reasonable to read the word "use" as being in contradistinction to disclosure, so that subsection (1) would treat of disclosure and subsection (2) other means of employing the information. Logic alone would argue against this interpretation since the forms of use that do not involve disclosure are so limited as to render the provision almost inoperative. Moreover, subsection (3) uses the word "disclosure" rather than "use"; and yet subsection (5) refers to evidence being "used under subsection (3)", suggesting that "use" is the generic term including disclosure and other utilization. It is clear, therefore, that subsection (2) permits disclosure to persons other than law enforcement officers, so long as that disclosure is made in connection with the disclosing officer's "official duties."

Under subsection (2), a law enforcement officer would obviously be authorized to dictate a memorandum concerning the contents of a wiretap to his secretary in preparation for criminal prosecution of an offense enumerated in Title III. It does not seem to us, however, that "official duties" are limited to duties connected with such criminal prosecution. If that had been intended, it would have been simple for the Congress to say "official duties in connection with the prosecution of offenses enumerated in this chapter." In light of the explicit purpose of the 1970 amendments described above, it is reasonable to conclude that the "official duties" can include the preparation of or furnishing information for civil actions. This conclusion is strengthened by subsection (3), which permits disclosure in criminal and civil actions by "any person who has received [wiretap information] by any means authorized by this chapter." It is significant that the word "person" is used here rather than "investigative or law enforcement officer." It is difficult to envision any common situation which would involve testimony in a civil action by one who is not a law enforcement officer and who has received the wiretap information "by [a] means authorized by this chapter" other than the situation precisely at issue

here--that is, the forwarding of information by the law enforcement officer who performed the wiretap, in the regular course of his duties, for the very purpose of civil prosecution. Any other situation falling within the terms of this provision would be a sport, and can hardly have been its primary object. For that reason, it seems appropriate to read the phrase "official duties" as including the duty of reporting violations for the purpose of imposing civil sanctions or obtaining civil remedies.

The analysis above only demonstrates that a person who receives wiretap information directly from a law enforcement officer (who transmits it in the course of his official duties) receives it properly and may testify concerning it in a civil action. But what of the person who receives it in turn from such a person? That is to say, must subsection (2) be read to require a new transmittal of the information directly from the law enforcement officer to each non-law enforcement official who is to participate in preparation of the civil action? To ask the question is almost to answer it. There is obviously no basis in reason for such a restriction. In our view, a law enforcement officer "uses" the information within the meaning of subsection (2) when he places it into the regular channel of communication used in preparing the civil case. Each subsequent employee who receives the information in that channel and in the course of his duties, receives it pursuant to the wiretapping officer's "use" and thus in a fashion authorized by section 2517. Such use also embraces disclosure to the person allegedly subject to civil liability (who is usually, but not always, the person whose conversation has been tapped) in connection with any official communication necessary to the Government's assertion of liability--for example, the complaint in the civil action, or (in tax cases) the required notices of assessment or letters of deficiency. Obviously, to preclude such disclosure would be effectively to preclude the civil actions, and thereby to frustrate the above-described purpose of the 1970 amendments.

Having reached the conclusions set forth above with respect to the third question posed by IRS, we hope that

necessarily generalized advice concerning the first two questions may no longer be needed. In view of the difficulty of treating them outside the context of a particular fact situation, and without a precise knowledge of the job descriptions of the individuals involved, we at least hesitate to approach these questions without further confirmation of their necessity. IRS may wish to reconsider its requests in light of the above.