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JUL 14 1976

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Fourth Amendment Restrictions on the Use of
Informants in Domestic Security Investigations

This is in response to your oral request for the views of this Office concerning limitations imposed by the Fourth Amendment on the warrantless use by the federal government of informants and undercover agents to gather domestic security information which could not constitutionally be obtained by means of a warrantless break-in or wire-tap.

In United States v. White, 401 U.S. 745, 749 (1971), the Supreme Court explained the general bearing of the Fourth Amendment on informant use as follows:

Hoffa v. United States, 385 U.S. 293 (1966), which was left undisturbed by Katz [v. United States], 389 U.S. 347 (1967)], held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States, at 302. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, Lewis v. United States, 385 U.S. 206 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. Lopez v. United States, 373 U.S. 427 (1963).

The analysis employed by the Court in the informant situation is thus very different from that applied to a warrantless surreptitious or coercive search.

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. . . . Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally "justifiable"--what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by Hoffa and Lewis. . . . Id. at 751-52.

There are, in other words, certain risks inherent in human relations which the Fourth Amendment does not protect against. Id. at 751. See also On Lee v. United States, 343 U.S. 747, 753-54 (1952).

These principles were reaffirmed by the Supreme Court in April of this year in United States v. Miller, 44 U.S.L.W. 4528, 4530 (U.S. April 21, 1976), a case involving government access to bank records:

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. . . .

This analysis is not changed by the mandate of the Bank Secrecy Act that records of depositors' transactions be maintained by banks. . . . [E]ven if the banks could be said to have been acting solely as

government agents in transcribing the necessary information and complying without protest with the requirements of the subpoenas, there would be no intrusion upon the depositors' Fourth Amendment rights. (Citations and footnotes omitted.)

Perhaps the most important limitation arising out of the principles advanced above is that an informant or undercover agent may gather information without a warrant (assuming no other justification for proceeding without a warrant, such as the "foreign intelligence" exception) only to the extent that the person from whom the information is gathered has voluntarily granted him access to the information. This is so even where the circumstances making a search possible have been created by the target. As stated in Gouled v. United States, 255 U.S. 298, 306 (1921):

. . . whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment. . . .

This principle was reaffirmed in Katz v. United States, *supra*, 389 U.S. at 351-52:

What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210; United States v. Lee, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253; Ex parte Jackson, 96 U.S. 727, 733.

Thus, the general rule would not support, for example, an informant's secret search for, or carrying away of, documents which were not entrusted to his custody.*/

*/ Of course a different situation is presented when the informant's relationship with the government commences after he has come into possession of the information, i.e., if he is not an agent of the government when he employs the improper means. See Burdeau v. McDowell, 256 U.S. 465 (1921).

The cases which have developed Fourth Amendment theory with respect to this issue all deal with the area of criminal investigation rather than intelligence or counter-intelligence investigation. We see no reason, however, why the theory would not apply unaltered in the latter context. It would certainly be strange to establish a varying interpretation of what constitutes a "justifiable expectation of privacy," depending upon which of two concededly legitimate governmental purposes prompts the information-gathering. Moreover, if a varying interpretation were to be adopted, it would likely be intelligence-gathering, rather than criminal investigation, which would occupy the preferred position, since the Supreme Court has indicated that the "policy and practical considerations" which apply to the former may call for a somewhat less restrictive reading of Fourth Amendment demands. United States v. United States District Court, 407 U.S. 297, 322-23 (1972).

Two caveats, however, must be added: First, it must be recognized that certain uses of informants may violate constitutional prohibitions other than those contained within the Fourth Amendment. See e.g., Massiah v. United States, 377 U.S. 201 (1964) (informant's eliciting of post-arrest incriminating statements in the absence of defendant's attorney held violative of Sixth Amendment right to counsel); White v. Davis, 120 Cal. Repr. 94, 533 P.2d 222 (Cal. 1975) (systematic, undercover police surveillance of state university classes held violative of First Amendment). Second, it must be noted that although the cases discussed above, approving warrantless use of informer techniques, speak in terms of complete inapplicability of the Fourth Amendment to such situations, it is not inconceivable that this formulation would, in a sufficiently appealing case, be narrowed to cover only the warrant requirement of the Fourth Amendment, leaving applicable the more general Fourth Amendment requirement of reasonableness. Under this formulation there could be prohibited, for example, the use of informants against a person who has no real or suspected connection with criminal wrongdoing or intelligence matters. The Supreme Court cases to date give no hint of such an approach, but it would in our view be prudent from the standpoint of constitutional law, as well as desirable from the standpoint of administrative responsibility, to assume that a "reasonableness" requirement is applicable.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel