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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner, vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, and HONORABLE WARREN J. FERGUSON, Respondent.	No. 71-1378 REAL PARTY IN INTEREST'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL SEALED EXHIBIT

The petitioner, the United States, has moved for leave to file a sealed brown box with the Court, containing "additional records and logs of overhearings." (Petitioner's Motion, page 1). The real party in interest, whose rights are most immediately affected by the decision in this case, opposes the motion. Petitioner's alternative request, that this Court remand the case to the district judge with instructions to receive the sealed box and open it up, is also discussed below, and the real party in interest expresses a qualified opposition to this proposal. The following argument makes three points:

1. The petitioner, not the district court, is responsible for the "distinction" between "foreign" and "domestic" national security surveillances, having invented and adhered to the distinction in all papers filed in all

criminal cases of which counsel has knowledge since the "national security" surveillance theory was sprung upon the legal community in 1969.

2. The fault, if any, for the district judge's error, if it was error, lies with petitioner. Petitioner failed to make complete disclosure in the court below and must not be permitted to retry its case in this court on evidence withheld from the district judge.

3. If there is to be a hearing involving the sealed brown box, it should be held in the district court and counsel for real party in interest should be permitted full access to the material in question, limited only by an appropriate protective order.

I

WHO INVENTED THE "DOMESTIC ORGANIZATION" CATEGORY?

The first memorandum ever filed in a district court in support of a "national security" exception to the fourth amendment was filed in United States v. Dellinger, No. 69 CR 180, N.D. Ill., in June of 1969. (Counsel has a copy of the pleading in question, and will make it available to the Court on request.) In the memorandum, government counsel said the following:

> "These surveillances [which the government feels should not be disclosed] fall into two broad categories: (1) surveillances designed to gather foreign intelligence information, which term we use to include the gathering of information necessary for the conduct of international affairs and for the protection of national defense secrets and installations from foreign espionage and sabotage, and (2) surveillances designed to gather intelligence information necessary to protect the nation from attempts of domestic organizations to use unlawful means to attack and subvert the existing structure of the government."
> Government's Answer to Defendants' Motions For Disclosure of Electronic Surveillance, p. 9, U.S. v. Dellinger, supra, filed June, 1969.

In this very case, the affidavit of Attorney General Mitchell adheres to the same distinction, stating in paragraph three that:

> "This defendant has participated in conversations which were overheard by Government agents who were monitoring a wiretap which was being employed to gather intelligence information

deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government."

(This same affidavit is filed as an exhibit to the government's petition.)

The affidavit filed in this case is to be contrasted with that signed by Attorney General Mitchell in United States v. H. Rap Brown, Docket No. 30966, Section "F", E.D. Louisiana, in which present counsel appeared for the defendant. In that affidavit, dated June 24, 1969, Mitchell said:

"On one occasion in early 1968, the defendant participated in conversations which were overheard by government agents who were monitoring a wiretap which was being maintained for the purpose of gathering foreign intelligence information."

Returning to this case, the government's "Memorandum Relating to Electronic Surveillance" in the court below contained the following admission:

"Although the issue before this Court involves the legality only of those electronic surveillances deemed necessary to gather intelligence information to protect the nation from internal attack and subversion we are setting forth below some discussion of the legality of electronic surveillances similarly employed to gather foreign intelligence information." At p. 5.

And in the same memorandum, the term "domestic organizations" appears at least twice, at pages 1 and 2.

Thus, the government adopted the "foreign-domestic" distinction, and urged it upon the district court here as it had in other cases. The distinction may or may not have validity; there is some discussion in the briefs of that question. Plainly, however, the government should not be permitted to treat the distinction, like a second-rate conjurer, as a "now you see it, now you don't" rabbit in the Attorney-General's hat.

II

SOME CONSIDERATIONS OF STRAYING OUTSIDE THE RECORD

The government chose to litigate below on a certain factual record,

not deigning to inform the district judge (and perhaps not even the Assistant United States Attorney) that there was more evidence to consider in the event that the court wished it. The government lost. Now, it seeks the extraordinary remedy of mandamus to overturn the decision below, but on a different record. This is, it bears noting, a criminal case.

For the reasons set out in the real party in interest's opposition to the petition, the government should not be permitted to keep adding additional evidence at each stage of the proceedings to work a change in the result. Such a practice not only plays fast and loose with the federal judiciary; it falls afoul of consistent federal policies of res judicata, collateral estoppel and double jeopardy.

The government's citation of Killian, 368 U.S. 231, is absurd. Killian involved a government concession of malfeasance at the Supreme Court level, and a consequent new trial to one who had been convicted. Such "augmentations" in the interest of the defendant are far different from attempts to improve a losing case by fance appellate footwork to tunes not played below. This distinction applies as well to United States v. Marshall, No. 26,889, in which appellants' motion for leave to supplement the record is pending. There, the proposed augmentation relates to matters which the movant had no chance to raise in the district court.

III

WHAT IS IN THE SEALED BOX?

The sealed box may prove more than the government wishes: it may show additional reasons for considering the search in question a "general search" in violation of the fourth amendment. The sealed box may support, or it may cast doubt upon, the constitutionality, wisdom or prudence of conducting the wiretap in issue.

Really, the government asks this court to play the role assigned

by Judge Carter, in United States v. Smith, No. 25,831, Order of September 30, 1970, to the district court. That order directed the district judge to hold the "proceedings required by Alderman v. United States, 394 U.S. 165." Taking the rule of Alderman to include that of its immediate progeny, Taglianetti v. United States, 394 U.S. 316 (1969) and Giordano v. United States, 394 U.S. 310, (1969), the real party in interest makes two contentions.

First, if there is to be an additional hearing, it should be in the district court. Second, at the hearing, the real party in interest is entitled to disclosure of the contents of the sealed box, and to the exhibit originally turned over to the district court in camera.

In Giordano, the Supreme Court said:

> "As we hold in Alderman, Ivanov, and Butenko..., the District Court must develop the relevant facts and decide if the Government's electronic surveillance is unlawful. Of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary." 394 U.S. at 312-313.

The Court did not say that in camera, ex parte proceedings are the means to determine whether a surveillance is lawful or not. Instead, it directs the district court to "find facts" about the surveillance before ordering a turnover of logs. There is no authority for any district court to find facts in any federal criminal case while dispensing with adversary inquiry. See United States V. Coplon, 185 F.2d 629 (2d Cir. 1950); Dennis v. United States, 384 U.S. 855 (1966). True, here as in hearings on producibility of Jencks Act materials under 18 U.S.C. Section 3500, see Campbell v. United States, 365 U.S. 85 (1961), 373 U.S. 487 (1963), some of the trappings of adversary inquiry may be unnecessary, but a hearing must not be dispensed with altogether. This Court's order, if it encompasses a remand, should condition a hearing below on proper disclosure,

to permit defense counsel full opportunity to challenge the determination of the need to tap.

Respectfully submitted,

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