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NO.
(ORIGINAL)
IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE STATE OF MICHIGAN
Plaintiff

v.

EDWIN MEESE, ATTORNEY
GENERAL FOR THE UNITED STATES
Defendant

Motion For Leave To File
Complaint for Declaratory Judgment

Complaint
For Declaratory Judgment

Brief in Support of Motion For Leave
To File Complaint For Declaratory
Judgment

Frank J. Kelley
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State of Michigan

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Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

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NOW COMES the State of Michigan, by Frank J. Kelley, Attorney General, John D. O'Hair, the Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and, pursuant to Rule 9 of the Rules of this Court, requests permission to file a complaint for declaratory judgment under

Rule 57 of the Federal Rules of Civil Procedure, and as reasons states as follows:

1. The jurisdiction of this Court is invoked under Article III, section 2 of the Constitution of the United States, and 28 USC 1251(3). See South Carolina v Katzenbach, 383 US 301 (1966).

2. Plaintiff is the State of Michigan, by its Attorney General, and its elected representative charged with the responsibility of prosecuting, on behalf of and in the name of the State, violations of the State criminal law occurring within the largest political subdivision of the State.

3. Defendant is the Attorney General of the United States, charged with the

responsibility of enforcing the laws of the United States.

4. Plaintiff seeks leave to file a Complaint to declare the rights between the parties; more particularly, plaintiff seeks a declaration that 18 USC 2515 is unconstitutional when applied to State proceedings as violative of the Tenth Amendment of the Constitution of the United States (see Complaint, and Brief in Support of Motion For Leave to File Complaint).

5. 18 USC 2515 provides that

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter (emphasis added).

6. Under 18 USC 2511 the interception or disclosure of a wire or oral communication by a private person, who is not a party to the communication, is a federal criminal offense. Under section 2515, then, evidence obtained by a private party in violation of section 2511, with no participation of any sort by any state or federal officials in the illegality, is inadmissible in a state court, as is any evidence derived from that illegally acquired communication. The statute also renders disclosure of the same by its admission in a state court proceeding a federal crime.

7. Plaintiff submits that Congress is without authority to require a State court, in the investigation and prosecution of criminal activity within the State, to exclude evidence illegally acquired by a private party without

participation in the illegality by governmental officials. Section 2515, as applied to require a State court to exclude such evidence, and to make such disclosures in State courts criminal in themselves, is unconstitutional as outside the power of Congress, the control of the admissibility of evidence not gained in violation of the Federal Constitution being a matter reserved to the States by operation of the Tenth Amendment to the Constitution.

8. The instant matter is appropriate for the exercise of this Court's original non-exclusive jurisdiction for several reasons.

A) Involved is an actual case or controversy, the speedy resolution of which is imperative. Plaintiff has received, anonymously, a tape recording made from a wiretap,

apparently achieved without the consent of the parties (all have filed affidavits to that effect). The tape reveals evidence of public corruption in the letting of government contracts, and the matter is before a grand jury. The mandate of 18 USC 2515 is stymying the investigation (section 2515 is being used as a shield to testimony required by grand jury subpoenas and to the production of documents through grand jury subpoena, see Gelbard v United States, 408 US 41; 33 L Ed 2d 179; 92 S Ct 2357 (1972)), and will require exclusion of the tape at trial should indictments issue, as well as the exclusion of derivative evidence. Indeed, admission of the tape or derivative evidence would constitute a federal criminal offense. Public confidence is undermined in such a

situation, and the ability of the State to investigate and prosecute the violation of its laws is hindered unconstitutionally by an Act of Congress. Prompt and final resolution of this question is imperative to the State's ability to root out public corruption.

B)The law regarding the application of the Tenth Amendment to Congressional regulation of State activity is sorely in need of review. See Garcia v San Antonio Metro, 83 L Ed 2d 1016 (1985) overruling National League of Cities v Usery, 426 US 833, 49 L Ed 2d 245, 98 S Ct 2465 (1976), but with a badly fractured Court, and in a case involving minimum wage and hour requirements of federal law as applied to public transit employees. As far

as Plaintiff can discern, no case has confronted the question of whether, under the Tenth Amendment, Congress may regulate the admission of evidence in a State court by compelling the exclusion of information gained by a private party acting alone in violation of a federal statute.

C) Plaintiff submits, then, that a compelling issue of constitutional law, the prompt resolution of which is imperative to the ability of the State to carry forth its sovereign duty to investigate and prosecute the violation of its laws, is presented. By analogy, if Congress were to pass a statute stating that "All trials in the courts of all states and their political subdivisions shall be conducted according to the Federal Rules of Evidence; any evidence not

admissible under the Rules may not be admitted by a state court or the court of any political subdivision," would there be any question but that Congress had exceeded its power? Similarly, if a private individual broke into an office in a federal enclave (perhaps a military base), and took evidence incriminating an individual in a murder in that state jurisdiction, would a federal statute providing that "no evidence discovered as the result of the violation of federal law may be admitted in evidence in any state court" pass constitutional muster under the Tenth Amendment, so as to preclude admission of the evidence at the state murder trial? Plaintiff submits not, and submits that Section 2515 raises this issue.

9. Plaintiff would note that no questions of fact are presented in this matter which would require the appointment of a Special Master.

10. For these reasons, Plaintiff requests that this Honorable Court exercise its original jurisdiction to resolve this important question of constitutional law relating to the power of Congress to regulate State judicial proceedings.

CONCLUSION

WHEREFORE, for the reasons above stated, Plaintiff requests that the Motion For Leave to File A Complaint be granted.

Respectfully submitted,

Frank J. Kelley
Attorney General
State of Michigan

John D. O'Hair
Prosecuting Attorney
County of Wayne
State of Michigan

Timothy A. Baughman
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Complaint
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NOW COMES the State of Michigan, by Frank J. Kelley, Attorney General, John D. O'Hair, the Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and, pursuant to Rule 9 of the Rules of this Court and Rule 57 of the Federal Rules of Civil Procedure, files this Complaint for Declaratory Judgment, requesting that

this Court declare that 18 USC 2515 is unconstitutional as violative of the Tenth Amendment when applied to State proceedings, and as reasons states as follows:

1. The jurisdiction of this Court is invoked under Article III, section 2 of the Constitution of the United States, and 28 USC 1251(3). See South Carolina v Katzenbach, 383 US 301 (1966).

2. Plaintiff is the State of Michigan, by its Attorney General, and its elected representative charged with the responsibility of prosecuting, on behalf of and in the name of the State, violations of the State criminal law occurring within the largest political subdivision of the State.

3. Defendant is the Attorney General of the United States, charged with the responsibility of enforcing the laws of the United States.

4. Plaintiff seeks leave to file a Complaint to declare the rights between the parties; more particularly, plaintiff seeks a declaration that 18 USC 2515 is unconstitutional when applied to State proceedings as violative of the Tenth Amendment of the Constitution of the United States (see Brief in Support of Motion For Leave to File Bill of Complaint).

5. 18 USC 2515 provides that

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court,

grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter (emphasis added).

6. Under 18 USC 2511 the interception or disclosure of a wire or oral communication by a private person, who is not a party to the communication, is a federal criminal offense. Under section 2515, then, evidence obtained by a private party in violation of section 2511, with no participation of any sort by any state or federal officials in the illegality, is inadmissible in a state court, as is any evidence derived from that illegally acquired communication. The statute also renders disclosure of the same by its admission in a state court proceeding a federal crime.

7. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

8. The only power delegated to the United States which conceivably could justify section 2515 is the commerce power. The question thus becomes whether under the commerce power Congress may compel the exclusion of evidence from State proceedings on the ground that the evidence was obtained by a private party in violation of a federal criminal statute involving use of the telephone (Plaintiff would note that section 2515 is not limited to the telephone, as eavesdropping through use of a taperecorder without the consent of some party to the conversation would also

violate federal law, triggering the exclusionary requirements of section 2515). Plaintiff seeks a declaration that Congress is without such authority, and that under the Tenth Amendment the State's retain the authority to set their own rules of admission and exclusion of evidence, absent violation of the constitution by state officials.

9. In Garcia v San Antonio Metro, 83 L Ed 2d 1016 (1985) a majority of this Court sustained federal regulation of state transit workers; however, the Court did suggest that there exist "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause," 83 L Ed 2d at 1937, though declining to attempt to sketch the contours of those limits. Where Congressional action requires the exclusion of evidence in a

state court proceeding, attention to the limits on federal action imposed by the "constitutional structure" is imperative. The various opinions in Garcia v San Antonio Metro suggest the need for a fresh look at Tenth Amendment doctrine, and a case outside wage and hour regulations is an appropriate vehicle. See the dissents of Justices Powell, Rehnquist, and O'Connor.

10. This case presents an actual case or controversy, see Motion For Leave To File Complaint.

11. No factual issues are presented in this matter which require appointment of a special master.

CONCLUSION

WHEREFORE, for the reasons above stated, Plaintiff requests that this Court declare that 18 USC 2515 is unconstitutional as violative of the Tenth Amendment to the extent that it restrains the admission of evidence in State courts.

Respectfully submitted,

Frank J. Kelley
Attorney General
State of Michigan

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County of Wayne
State of Michigan

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STATEMENT OF THE QUESTION

IS 18 USC 2515 AN
UNCONSTITUTIONAL INTERFERENCE
WITH RIGHTS RESERVED TO THE
STATES UNDER THE TENTH
AMENDMENT INSOFAR AS IT
PROHIBITS A STATE COURT FROM
ADMITTING INTO EVIDENCE
MATERIAL PROCURED BY A PRIVATE
INDIVIDUAL WITHOUT VIOLATION OF
ANY PROVISION OF THE FEDERAL
CONSTITUTION?

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Article III, section 2 of the Constitution of the United States, and 28 USC 1251(3). See South Carolina v Katzenbach, 383 US 301 (1966).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides, in pertinent part:

The Congress shall have Power to....regulate Commerce...among the several States....

The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by

it to the States, are reserved
to the States respectively, or
to the people.

STATEMENT OF THE CASE

See Motion for Leave to File Complaint,
and Complaint.

REASONS FOR GRANTING LEAVE

18 USC 2515 IS AN UNCONSTITUTIONAL INTERFERENCE WITH RIGHTS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT INsofar AS IT PROHIBITS A STATE COURT FROM ADMITTING INTO EVIDENCE MATERIAL PROCURED BY A PRIVATE INDIVIDUAL WITHOUT VIOLATION OF THE FEDERAL CONSTITUTION.

Article I, Section 8 of the United States Constitution provides, in pertinent part:

The Congress shall have Power to....regulate Commerce...among the several States....

The Tenth Amendment to the United States Constitution provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Plaintiff submits that the regulation of the admission of evidence in a state court proceeding, particularly where that evidence was gained by a private party

acting wholly alone, without any governmental complicity of any sort, is a power "not delegated to the United States by the Constitution," and therefore is a power "reserved to the States respectively, or to the people." Congressional regulation of the admission of evidence in State court proceedings, then, is violative of the Tenth Amendment, where no unconstitutional conduct on the part of governmental officials is involved in the procurement of the evidence (nor, for that matter, any conduct which is statutorily impermissible).

18 USC 2515 provides that

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a

political subdivision thereof if the disclosure of that information would be in violation of this chapter (emphasis added).

Under 18 USC 2511 the interception of a wire or oral communication by a private person, who is not a party to the communication, is a federal criminal offense; further, disclosure of that intercepted communication by anyone is a federal criminal offense. Under section 2515, then, evidence obtained by a private party without violation of any provision of the Federal Constitution, and with no participation of any sort by any state or federal officials in the illegality, is inadmissible in a state court, as is any evidence derived from that illegally acquired communication. The statute also renders disclosure of the same by its admission in a state court proceeding a federal crime.

The only power "delegated to the United States" which might conceivably justify this intrusion into State court criminal investigations and prosecutions is the commerce power under Article I, Section 8 of the Constitution of the United States. Plaintiff submits that the sweep of the commerce power cannot reach so far without running afoul of the protections afforded the States by the Tenth Amendment, which is, after all, a part of the Bill of Rights, adopted to provide protection to the States as against encroachment by the Federal Government upon the legitimate exercise of state sovereignty. See generally Garcia v San Antonio Metro, *infra*, dissent of Justice Powell. Investigation via grand jury, and prosecution of offenses against the laws of the State, are surely part and parcel of legitimate State sovereignty.

In Garcia v San Antonio Metro, 83 L Ed 2d 1016 (1985) a majority of this Court sustained federal regulation of state transit workers; however, the Court did suggest that there exist "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause," 83 L Ed 2d at 1937, though declining to attempt to sketch the contours of those limits. Where Congressional action requires the exclusion of evidence in a state court proceeding, attention to the limits on federal action imposed by the "constitutional structure" is imperative. The various opinions in Garcia v San Antonio Metro suggest the need for a fresh look at Tenth Amendment doctrine, and a case outside wage and hour regulations is an appropriate vehicle. See the dissents of Justices Powell, Rehnquist, and O'Connor. Plaintiff

cannot presently suggest an alternative test to that of National League of Cities which this Court overruled in Garcia v San Antonio Metro; however, San Antonio Metro does not purport to create an all-inclusive test, and Plaintiff submits that the analysis employed in that case is wholly inappropriate where Congress attempts to impose not wage and hour requirements on state employees, but rules precluding the admission of evidence in state court proceedings. Such an intrusion simply must fall within the "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause," 83 L Ed 2d at 1037.

Article I, Section 8 delineates the powers of Congress, and all powers not delineated are, by operation of the Tenth Amendment, reserved to the States or to

the people. That which Justice Harlan called "our Federalism" must mean more than that Congress itself may be the sole judge of whether an exercise of its power falls within Article I, Section 8, or, falling without it, falls within the Tenth Amendment, at least where an interference with State judicial proceedings is involved. If Congress has such power, then the Tenth Amendment serves no purpose whatsoever. This Court should grant leave to file the Complaint to define the contours of the limits on federal action imposed by the Tenth Amendment, and to allow the state investigation of public corruption to continue unimpeded by Congressional action rendering certain evidence inadmissible in state proceedings.

CONCLUSION

WHEREFORE, for the reasons above stated Plaintiff requests that the Motion For Leave to File Complaint be granted.

Respectfully submitted,

Frank J. Kelley
Attorney General
State of Michigan

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