No. 107, Original

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF MICHIGAN, PLAINTIFF

v.

EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE DEFENDANT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court, pursuant to its original but nonexclusive jurisdiction, should grant leave to file the bill of complaint, in which plaintiff contends that 18 U.S.C. 2515 violates the Tenth Amendment by limiting the admissibility of electronic surveillance evidence in state criminal proceedings.

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JURISDICTION

Plaintiff invokes the original jurisdiction of this Court under Article III, Section 2, of the Constitution and 28 U.S.C. 1251(b)(3).

STATEMENT

1. This Court in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967), considered the Fourth Amendment standards that apply to electronic surveillance by law enforce-

ment officers. In an effort to implement this Court's decisions in those cases, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (& Supp. III) 2510-2520, a comprehensive set of regulations governing the interception and disclosure of oral and wire communications.[1] The statute prohibits the interception and disclosure of such communications except in specified circumstances, and it regulates the manufacture, possession, and advertising of devices that can be used to intercept communications. In addition, Title III prescribes the procedures to be followed by both federal and state law enforcement officers in order to obtain authorization to intercept oral and wire communications; the information gained through an authorized interception may be disclosed to other persons and used as evidence in criminal proceedings. The statute further provides that "no part of the contents of [a wire or oral] communication and no evidence derived therefrom may be received in evidence" in any state or federal proceeding "if the disclosure of that information would be in violation of [the statute]" (18 U.S.C. 2515).

The reasons for the adoption of Title III are set forth in a series of congressional findings included in

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[1] The statute defines a wire communication as "any communication made in whole or in part through the use of facilities for the transmission of communications * * * by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications" (18 U.S.C. 2510(1)); an oral communication is "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation" (18 U.S.C. 2510(2)).

the text of the statute. Congress found that "[w]ire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation" (Pub. L. No. 90-351, § 801(a), 82 Stat. 211). Congress further found that "[e]lectronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications." *Ibid.*; see also S. Rep. 1097, 90th Cong., 2d Sess. 66-69 (1968). Congress concluded that

> [i]n order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary * * * to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

Pub. L. No. 90-351, § 801(b), 82 Stat. 211; see also S. Rep. 1097, *supra*, at 69 (discussing need for uniform national standards). Recognizing that the ability to intercept communications by wrongdoers is an important weapon in the arsenal of law enforcement authorities, Congress specifically endorsed that practice, prescribing standards for official use of wiretapping and electronic surveillance "intended

to conform to the *Berger* and *Katz* decisions." *Id.* at 75; see generally *United States* v. *Giordano*, 416 U.S. 505 (1974).

2. The State of Michigan moves for leave to file a complaint seeking a declaratory judgment that 18 U.S.C. 2515—the provision of Title III requiring the exclusion of evidence obtained through unlawful interception of wire or oral communications—violates the Tenth Amendment when it is applied to require the exclusion of evidence in state proceedings. The State asserts 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" (Mot. 4-5). According to the State, the application of Section 2515 to state criminal proceedings in those circumstances infringes the authority reserved to the states by the Tenth Amendment.

Michigan alleges that it "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)" (Mot. 5-6). It asserts that "[t]he tape reveals evidence of public corruption in the letting of government contracts, and the matter is before a grand jury" (*id.* at 6). According to Michigan, "[t]he mandate of 18 USC 2515 is stymying the investigation" because it is preventing the grand jury from obtaining evidence and "will require the exclusion of the tape at trial should indictments issue, as well as the exclusion of derivative evidence" (*ibid.*). Michigan states that "[p]rompt and final resolution [of its challenge to the constitutionality of Section 2515] is imperative

to the State's ability to root out public corruption" (*id.* at 7).

ARGUMENT

Michigan seeks to invoke this Court's nonexclusive original jurisdiction to obtain a determination regarding the constitutionality of 18 U.S.C. 2515. Since an alternate forum plainly is available to Michigan, and since all other relevant factors weigh strongly against the exercise of the Court's original jurisdiction, the motion for leave to file a bill of complaint should be denied.

This Court consistently has adhered to the view that its original jurisdiction should be exercised sparingly. See, *e.g.*, *Arizona* v. *New Mexico*, 425 U.S. 794, 796 (1976); *United States* v. *Nevada*, 412 U.S. 534, 538 (1973); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 497-499 (1971); *Utah* v. *United States*, 394 U.S. 89, 95 (1969); *Massachusetts* v. *Missouri*, 308 U.S. 1, 18-20 (1939). "What gives rise to the necessity for recognizing such discretion [in the exercise of the Court's original jurisdiction] is pre-eminently the diminished societal concern in [the Court's] function as a court of original jurisdiction and the enhanced importance of [its] role as the final federal appellate court." *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. at 499; see also *Arizona* v. *New Mexico*, 425 U.S. at 797; *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972); *Illinois* v. *City of Milwaukee*, 406 U.S. at 93-94.

The factors governing the Court's exercise of its nonexclusive original jurisdiction are (1) "the availability of another forum where there is jurisdiction over the named parties, where the issues may be liti-

gated, and where appropriate relief may be had," and (2) "the seriousness and dignity of the claim." *Illinois* v. *City of Milwaukee*, 406 U.S. at 93; see also *South Carolina* v. *Regan*, 465 U.S. 367, 400-401 (1984) (O'Connor, J., concurring in the judgment) ("[a]n original party establishes that a case is 'appropriate' for obligatory jurisdiction by demonstrating, through 'clear and convincing evidence' that it has suffered an injury of 'serious magnitude' and that it otherwise will be without an alternative forum" (citations omitted)).

At least one alternate judicial forum plainly is available to Michigan. The Declaratory Judgment Act, 28 U.S.C. (& Supp. III) 2201-2202, authorizes the district courts to consider the very claim presented by Michigan here and, if Michigan prevails, to award the declaration of unconstitutionality that Michigan seeks from this Court. Michigan also may be able to raise the issue in the context of a state criminal proceeding. Although it is not clear whether Michigan could obtain a pre-indictment determination in state court, it could seek a pretrial ruling regarding the admissibility of the evidence and, if its constitutional claim were rejected, seek appellate review (see Mich. Stat. Ann. § 28.1109(12)(c) (1986)).

Where a plaintiff has "another adequate forum in which to settle his claim," the Court is "particularly reluctant to take [original] jurisdiction of a suit." *United States* v. *Nevada*, 412 U.S. at 538; see also *Illinois* v. *City of Milwaukee*, 406 U.S. at 93; *Washington* v. *General Motors Corp.*, 406 U.S. at 114; *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. at 497-499; *Massachusetts* v. *Missouri*, 308 U.S. at 19-20; *Georgia* v. *City of Chattanooga*, 264 U.S. 472, 483-484 (1924). A plaintiff can overcome this heavy

presumption against the exercise of original jurisdiction only by a strong showing that the seriousness of the claim—in terms of its general importance, the posture of the case, and the need for immediate resolution—justifies its initial consideration by this Court despite the existence of the alternative forum. See *South Carolina* v. *Regan*, 465 U.S. at 381-382 (plurality opinion) (observing that the complaint raised a "question that is of vital importance to all 50 States"); *id.* at 384 (Blackmun, J., concurring in the judgment) ("[t]he issue presented is a substantial one, and is of concern to a number of States"); *id.* at 401-402 (O'Connor, J., concurring in the judgment); *United States* v. *Nevada*, 412 U.S. at 540 (citing ripeness concerns in declining to exercise original jurisdiction); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 307 (1966) (questions presented "were of urgent concern to the entire country"). Michigan does not come close to satisfying this standard.

First, the fact that Michigan has asserted a constitutional claim plainly is not sufficient justification for the exercise of this Court's original jurisdiction. The Court frequently has rejected efforts by states to institute original actions seeking determinations of the constitutionality of federal actions. See *Idaho* v. *Vance*, 434 U.S. 1031 (1978); *Alabama* v. *Connally*, 404 U.S. 933 (1971); *Massachusetts* v. *Laird*, 400 U.S. 886 (1970).

Indeed, the Court has exercised its jurisdiction over such a claim only where the constitutionality of the statute was challenged soon after enactment and the plaintiff showed that the question was "of urgent concern to the entire country" (*South Carolina* v. *Katzenbach*, 383 U.S. at 307). Michigan's challenge to the constitutionality of Section 2515 did not sur-

face for almost 20 years. In addition, Michigan has not shown that the issue is one of general importance to the states' ability to enforce their criminal laws; it asserts only that a single criminal investigation in one state may be impeded by the federal statute. This Court is not the proper forum for such a claim.

Second, given the demands on this Court's original and appellate docket, it seems plain that expedited consideration of Michigan's claim by the lower courts would result in a more expeditious decision than an original action in this Court. This is especially true because, contrary to Michigan's assertions (Mot. 10), there are potential issues of fact lurking in this case. For example, Michigan repeatedly emphasizes that the wiretap evidence was "acquired by a private party without participation in the illegality by government officials" (see, *e.g.*, Mot. 4-5), but it also states that it received the evidence "anonymously" (*id.* at 5). The question arises how Michigan can be sure that government officers did not participate in the illegal wiretap.[2]

In addition, although Michigan asserts that its constitutional challenge is directed solely at Section 2515, other provisions of Title III bar law enforcement officers from using or disclosing information intercepted by means other than those permitted under the statute (see 18 U.S.C. (& Supp. III) 2511, 2517). Michigan's argument therefore has considerably more extensive implications than Michigan

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[2] The private parties with an interest in the criminal proceeding may have other factual arguments to present; indeed, the fact that these parties have a significant interest in participating in the adjudication of the constitutional issue also weighs in favor of requiring Michigan to proceed by way of an action in district court.

itself acknowledges: the argument Michigan makes would require evaluation of the constitutionality of other provisions of Title III as well. For all of these reasons, this Court should exercise its discretion by declining to entertain this action.

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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JANUARY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40185