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U.S. Seeks to Overturn Undercover Agent Ruling

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A police undercover agent does not necessarily violate the rights of a defendant by posing as a codefendant and joining in discussions with the defense lawyer, the Justice Department has told the Supreme Court.

Such covert activity, which a lower court held was a violation of the accused person's civil rights, may be justified if the agent would lose his "cover" by deviating from his pose as an ally of the individual under investigation, the department said.

Calling undercover work "necessary, if unpleasant" Solicitor General Robert H. Bork said agents and informants should not have to undergo suits for damages if they become involved in "passive intrusions" into conferences between client and lawyer.

Bork, in a friend-of-the-court brief, asked the court to reverse a 1975 decision by the Fourth U.S. Circuit Court of Appeals that exposed Jack M. Weatherford, an informant for the South Carolina state police, and police chief Pete Strom to liability for civil rights violations.

They were sued by Brett A. Bursey, a former University of South Carolina student who was indicted in 1970 along with Weatherford for vandalizing a local draft board office. Bursey was convicted in 1971 after Weatherford's surprise testimony for the prosecution.

Bork said the high court's decision in the South Carolina case, which is

expected sometime next year, "may affect the personal liability of officers and employees of the United States" as well as agents for state and local police.

In addition, Bork said, the case could shed light on "the constitutional norms" that will govern undercover work when an agent's need to preserve his cover clashes with "the confidentiality of defense planning in a criminal case."

Courts have frequently thrown out evidence gathered by informants or wiretapping when lawyer-client communications were involved. In 1966, however, the Supreme Court upheld the jury-tampering conviction of the late Teamster President James R. Hoffa on the testimony of an informant who sat in on meetings between Hoffa and defense lawyers at a criminal trial.

"Although it may be tempting to declare that there is an absolute 'right to confidence,' such a declaration would bear too high a price," Bork said. "There is no right to perfect confidence in meetings with counsel, especially those to which third parties are invited."

If the Court of Appeals is upheld, Bork said, defendants will have "a fail-safe method of detecting informants. Any defendant could invite one suspected of being an informant to a meeting with counsel," forcing a choice between refusing—and thereby confirming suspicions—and accepting, which would later expose the informant to a civil suit.