INFILTRATORS

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Prosecutors' Use of Informers Stirs a Legal Debate

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WASHINGTON, April 23—Despite recurring complaints by civil libertarians and others, including judges, the nation's courts have imposed few restrictions on the Government's use of informers and other undercover agents.

Now the legality of using secret agents is again at issue, partly because of developing legal concepts and partly because of the rash of recent disclosures about undercover work by all branches of Government.

Some of the issues are in the courts. A few lower Federal courts, in direct conflict with others, have been throwing out prosecutions under a developing concept of "fairness" where, for example, Government agents helped make the crime possible, supplying the opportunity for a drug sale.

The Supreme court agreed a few weeks ago to consider a case raising the issue. It had been urged to do so by the Justice Department, which opposes the developing trend.

The California Supreme Court, also a few weeks ago, seemed to adopt another developing concept—that the use of secret agents be limited to assure First Amendment guarantees. The court reversed a lower court's dismissal of a complaint seeking an injunction against law enforcement surveillance on campus, saying that such surveillance could violate First Amendment rights.

Some Protection

Other questions—as to what the law is, and what it should be—have been raised by the recent disclosures and allegations, including those of informers working in Miami for the Internal Revenue Service, in New York for Maurice H. Nadjari, the special state prosecutor, and in the defense camps in the Wounded Knee and Attica cases.

The courts have created a few protections over the years for targets of secret agents" They can learn the identity and backgrounds of agents in some situations, for instance, and agents may not intrude upon a defendant's discussion with his or her counsel about the defendant's case.

Sometimes, too, the courts have chastized law enforcement for undercover schemes, as with the recent rulings in New York criticizing the tactics of Mr. Nadjari. But mostly, they have reaffirmed the Government's right to uss secret agents, and to use them broadly.

The question now is whether the courts' rulings are adequate to deal with Government's growing use of undercover agents.

The debate is significant because it involves important competing needs and values—the need for effective law enforcement and the values of privacy, free political association, free speech and due process.

At the heart of the problem is this question: To what extent should Government in a free society have secret agents in the community?

There are these other serious questions:

¶Who should make the final decision on whether to use an informer in a case—the police, as is the situation now, or a judge?

¶Should law enforcement be able to take advantage of personal relationships as it does now, using an employe, for example to spy on the employer, or a person to spy on a friend?

¶To what extent—if ever—should the Government's agents be allowed to participate in crime to make their cases?

Mr. Nadjari and other prosecutors insist upon the necessity of broad latitude in using informers. There is often no other way, they contend, to get the information they need.

But many lawyers, including prosecutors, see a need for at least some new controls, whether from the courts or legislatures or from law enforcement itself. Some see a need for dramatic change.

Robert M. Morgenthau Jr., District Attorney of Manhattan, favors the use of informers generally but would set limits. He is against infiltrating political groups except where there is evidence of a crime, he said in an interview. He is also against Government agents committing crimes in their undercover work, except in making "buys" of contraband such as drugs or guns.

Nathan Lewin, a former Deputy Assistant Attorney General and now a visiting professor at Harvard Law School, and Paul Chevigny, a lawyer with the New York Civil Liberties Union, have argued for stringent judicial control in the form of warrant requirements. In this system, law enforcement officials would have to get warrants before using informers in certain situations, such as infiltrating political groups or using one supposed friend to spy on another.

There is a big gap between the law as it is and as it should be, Mr. Lewin contends. Warrants, he says, are necessary to protect such values as the right to privacy.

'Some Social Costs'

Philip Lacovara, former counsel to the Watergate special prosecutor and before that, counsel to the New York City Police Commissioner, said: "There's no question that enforcement of the law involves some social costs." Often, he said, these costs are justified.

Using friends as informers is often necessary, he said in an interview this week, for in organized crime as in Watergate, close associates may be the only witnesses.

Mr. Lacovara questions, though, whether informers or other agents should participate in arranging crimes. He says "there are good reasons for tighter controls" on agents.

"Frequently, informers and undercover agents have gone along with pretty violent kinds of intermediate steps," he said, on the rationale that "it's necessary to prove yourself so that you can stick around to make the case."

"I'm not sure the ends to be achieved are worth that kind of effort," he added.

Courts have dealt with some of the issues and suggestions being raised. The law on the use of undercover agents is a collection of decisions on assorted aspects of undercover work, a collection of not-always uniform holdings with a few common threads, rather than a comprehensive statement of rights and duties.

How They Add Up

Some are rulings by the Supreme Court, others by lower courts. A few date to the eighteen-nineties; most were issued in the last 25 years, particularly the last 10.

Taken together, they add up to the following actions Government may take:

¶Use either civilian informers or policemen in disguise to investigate crimes without warrants.

¶Wire secret agents with recording devices, and the agents need not have warrants.

¶Send agents into organizations as infiltrators.

¶Create an opportunity for

someone to commit a crime, so long as that person was "predisposed" to commit that type of crime.

¶Employ a co-conspirator or accomplice as an informer against the fellow accomplice.

¶Employ an acquaintance of the target of the investigation.

¶Use the informer as a witness at trial.

¶Usually keet secret the identities and operations of those who do not appear as witnesses.

Government may not, however, "entrap" the defendant —a long-standing rule that has been interpreted differently by courts, but which the Supreme Court defined in 1973 as a ban against luring into the commission of a crime someone with no "predisposition" to commit such a crime. In some states, statutes specifically provide for entrapment as a defense.

True Identity Disclosed

Nor may the Government intrude upon an attorney-client relationship by wiretapping a defendant's calls to his lawyer, or having an informer present at defendant-defense counsel meetings. Similarly, the Government may not get a confession by using the defendant's accomplice as an informer, unbeknownst to the defendant, and sending the accomplice to talk to the defendant.

Also, when the informer or secret agent is a principal witness in the case—such as when an undercover policeman buys heroin from a pusher and the pusher is then charged with selling heroin—the Government generally must disclose the true identity of the agent.

On cross-examination at the trial, defense counsel can then elicit such information as the witness's background and whatever deal or arrangement the witness has with the Government.

The great latitude given to law enforcement officials has several explanations.

The overriding reason for the basic and continuing thrust of the law is the same as the prosecutors' rationale for undercover work: need. Over and over, the courts have stated that undercover work is a crucial tool of law enforcement.

The United States Court of Appeals for the Second Circuit put it thus in 1950:

"Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. Entrapment excluded, of which there was none here, decoys and other deceptions are always permissible.

Entrapment Decision

Last January, the United States Court of Appeals for the 10th Circuit upheld a defendant's conviction for selling drugs, rejecting his contention that he had been "entrapped" by an informer's illegal marijuana dealings.

"The role of the informer is indeed dirty business," the court said, "but, as many before us have said, so, too, is heroin."

Prof. Jerold H. Israel of the University of Michigan Law School suggests several other explanations.

First, he says, there is the great diversity of undercover agents—from the one-time civilian informer to the regularly paid "stool pigeon" to the co-conspirator seeking lenient treatment to the police officer in disguise. This diversity, he says, makes it hard for the courts to draw lines.

Second, he says, is the "lack of a clear-cut handle in the Constitution," such as the ban on search and seizures. The courts, for instance, have found it much easier to view electronic surveillance than the use of informers as a "search"—mistakenly so, according to some critics such as Mr. Lewin, who views the informer as a "live bug". More than once, the Supreme Court has remarked that the Constitution provides no protection against one person's misplaced trust in another.

Third, according to Professor Israel, is the courts' unfamiliarity with the size and nature of the use of undercover agents.

The reasons underlying the few exceptions the courts have recognized are simpler.

The Constitution guarantees defendants the right to effective assistance to counsel; intruding surreptitiously on a defendant's discussions with his lawyer makes effective counsel difficult, if not impossible.

The Constitution guarantees a defendant the right to confront the witnesses against him: Keeping a witness's true identity secret makes cross-examination an empty right.