Dismissal in Civil Cases for Nondisclosure of Surveillance Records: Potential Conflicts with an Eavesdropper's Constitutional Rights

Mark J. Rogers
Indiana University School of Law

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DISMISSAL IN CIVIL CASES FOR NONDISCLOSURE OF SURVEILLANCE RECORDS: POTENTIAL CONFLICTS WITH AN EAVESDROPPER'S CONSTITUTIONAL RIGHTS

Prior to 1968, the use of electronic surveillance in the private sector was widespread and extensively documented. At that time it was estimated that wiretapping and electronic eavesdropping in industrial espionage tripled every year. In response to this invasion of privacy Congress included title III within the Omnibus Crime Control and Safe Streets Act of 1968. Section 2515 of title III grants a civil litigant the right to exclude evidence obtained from illegal electronic surveillance conducted by a private party. Because of the awareness spawned by the public debate surrounding wiretapping in the late sixties and due to an increased ability to detect surveillance devices, civil litigants will now be more likely to discover whether they have been the victims of illegal surveillance, thus presumably leading to wider use of § 2515’s protections.

4. 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. 18 U.S.C. § 2515 (1970). The circumstances under which disclosure is illegal are set forth in §§ 2511 and 2517. 18 U.S.C. §§ 2511, 2517 (1970).
5. Wiretapping, supra note 1, at 98.
6. The five years following the passage of 18 U.S.C. §§ 2510-20 have doubtless significantly hindered the growth of the technology of eavesdropping devices. Section 2512(b) has prohibited the manufacture of such devices. However, no such hindrance has been imposed upon the development of devices for detecting surveillance equipment. Thus, with the presumed increase in detection equipment sophistication occurring simultaneously with an effective halt in the general development of listening devices intended for public consumption, it is not unrealistic to expect that at least some improvement in the detection of eavesdropping and wiretapping equipment has been achieved in the last few years.
7. There are numerous examples of private individuals discovering electronic
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Section 2515 is implemented by a motion to suppress tainted evidence. Normally, full disclosure of surveillance records prior to a suppression hearing will be ordered to enable an aggrieved party to prepare adequately for the hearing. A failure to make such disclosure will at times require the trial court to dismiss an eavesdropper's case in order to fully protect a party's right to privacy as guaranteed by § 2515. However, the court’s power to dismiss is limited by the eavesdropper’s constitutional rights. Dismissal without a hearing for some failures to disclose may be a denial of the eavesdropper’s due process rights or impose an impermissible burden on the eavesdropper’s assertion of the privilege against self-incrimination. This note will identify situations where dismissal raises conflicts with the eavesdropper’s rights and attempt to construct an analytical framework for resolving these problems.

THE PROCEDURAL CONTEXT

Following the commencement of a civil suit between an eavesdropper and his victim on some matter collateral to the illegal surveillance, the aggrieved party may move for suppression of all evidence gained as a result of illegal surveillance activities. This motion is made on the ground that the victim's communications were unlawfully intercepted by his opponent. The aggrieved party must make a prima facie showing of such illegal surveillance before a suppression hearing will be granted.

surveillance conducted against them by other persons. See, e.g., Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964).

8. See text accompanying notes 14-20 infra.

9. It should be noted that sanctions for nondisclosure are not provided in 18 U.S.C. §§ 2510-20 (1970). However, they are available under Fed. R. Civ. P. 37 (b) (2) (A)-(D). Among the sanctions available are “dismissing the action... or rendering a judgment by default against the disobedient party.” Fed. R. Civ. P. 37 (b) (2) (C). Although dismissal is usually thought of as a sanction against a plaintiff and default judgment as the analogous sanction against a defendant, the term “dismissal” will be used in this note to encompass such a sanction against either party.

10. See note 25 infra.

11. The scope of this note is limited to civil disputes where, for example, an eavesdropper sues for breach of contract and he intends to use evidence which was obtained from electronic surveillance activities. A civil suit against the eavesdropper for damages arising from his illegal interception of wire or oral communications is authorized under § 2520 of title III but will not be considered here. 18 U.S.C. § 2520 (1970).


13. When a criminal defendant makes a prima facie showing that the government has eavesdropped, the burden shifts to the government to show that its evidence against the defendant was not tainted by unlawful wiretapping. E.g., United States v. Goldstein, 120 F.2d 485, 488 (2d Cir. 1941). Similarly, such a showing by the aggrieved party under § 2518 (10) (a) (i) ought to be sufficient to elicit a court order granting a suppression hearing.
The next step is to order disclosure of surveillance records so that
the aggrieved party can prepare for the suppression hearing. Section
2518 (10) (a) (iii) provides that

upon the filing [of a motion to suppress] by the aggrieved
person, [the judge] may in his discretion make available to the
aggrieved person or his counsel for inspection such portions of
the intercepted communication or evidence derived therefrom as
the judge determines to be in the interests of justice.14

This broad discretion in ordering disclosure has been severely curtailed
by Alderman v. United States,15 at least where illegal surveillance by the
government infringes upon a criminal defendant’s fourth amendment
rights. In Alderman, the Supreme Court reasoned that if the fourth
amendment exclusionary rule were to effectively protect the defendant’s
fourth amendment rights, disclosure of all surveillance records would be re-
quired, regardless of their arguable irrelevance to the case against the
defendant.16 Thus, the Court made full disclosure prior to the sup-
pression hearing a constitutional minimum for the effective use of the
fourth amendment exclusionary rule.17

Utilizing the rationale behind the Alderman decision, full disclosure
ought to be required in civil applications of § 2515 as well since § 2515
was intended to protect rights equal in importance to those protected
by the fourth amendment exclusionary rule. Congress’ purpose in
making § 2515 applicable to civil cases was stated in commentary ac-
companying that provision: “[The suppression of evidence] is not
limited to criminal proceedings. Such a suppression rule is necessary
and proper to protect privacy.”18 Moreover, in earlier legislative com-
mentary applicable to all provisions of title III, “privacy” had been
described as “a right arising under certain provisions of the Bill of
Rights and the due process clause of the 14th amendment.”19 Thus,
because of the constitutional importance of the right of privacy protected
by § 2515, congressional intent would be frustrated if pre-suppression
hearing procedures were less than the constitutional minimum provided

16. Id. at 182.
17. Id. at 184. Compare Hearings on S. 39 Before Subcomm. No. 5 of the House
Comm. on the Judiciary, 91st Cong., 2d Sess. 377-80 (1970) (Prepared Statement of
Professor Herman Schwartz) with 116 CONG. REC. 8659-67 (daily ed. June 9, 1970)
(remarks of Senator John McClellan).
18. SENATE REPORT, supra note 1, at 96 (emphasis added).
19. Id. at 92.
in *Alderman*.20

Assuming that full disclosure has been ordered, the next step is to determine what sanction should be applied to an eavesdropper who fails to make such disclosure. In *Alderman*, the Court held that a failure to make full disclosure would require dismissal of the case against a criminal defendant.21 The implicit premise behind such a severe sanction can be described in the following syllogism: (1) The government cannot build its case against the defendant with evidence gained as a result of a violation of the defendant's constitutional rights;22 (2) When the defendant is not armed with the product of full disclosure, the suppression hearing may not adequately identify all of the evidence which the govern-

20. It is elementary that ineffective procedural safeguards can result in the loss of substantive rights. Moreover, such safeguards are tailored to the importance of the right being protected. Where electronic surveillance by the government violates a criminal defendant's fourth amendment rights, as in *Alderman v. United States*, 394 U.S. 165 (1969), a court must employ constitutional analysis to procedures protecting that right because of governmental action. But where the infringement of individual rights involves no governmental involvement, constitutional analysis is inappropriate. In such cases a court must look to congressional intent to determine the degree of procedural protection to be accorded a statutory right such as § 2515. Congress may, of course, require protection of a privately infringed right at a level less than, equal to or even exceeding constitutional minima protecting similar rights from governmental infringement. Cf. *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) (holding that 42 U.S.C. § 1985 (3) reaches purely private conspiracies to deprive persons of constitutional rights). Thus, the question becomes whether Congress intended procedures for the protection of § 2515 rights to be equal to the constitutional minimum used in protecting the effectiveness of the fourth amendment exclusionary rule.

Although Congress felt it was providing adequate protection for privacy rights guaranteed by § 2515 in leaving disclosure of surveillance records to the discretion of the trial court judge, 18 U.S.C. § 2518 (10(a)(iii) (1970), at the time title III was passed, the *Alderman* decision had not been available for congressional consideration. It is plain from a reading of congressional commentary accompanying § 2518 (10(a)(iii) that Congress did not comprehend the significance of the relationship between the pre-suppression hearing disclosure issue and the vitality of § 2515. See *Senate Report*, supra note 1, at 106. The sheer force of the rationale of the full disclosure rule in *Alderman* cogently reveals Congress' failure to consider the impact of disclosure on § 2515 rights. That rationale may be paraphrased as follows:

[I]f the [suppression] hearings [effectuating § 2515 rights] are to be more than a formality and [the aggrieved party] not left entirely to reliance on [the eavesdropper's] testimony, there should be turned over to [him] the records of those overheard conversations which the [eavesdropper] was not entitled to use in building [his] case against [the aggrieved party].

*Alderman v. United States*, 394 U.S. 165, 183 (1969). Furthermore, it is clear that Congress felt that the privacy right protected by § 2515 was at least as important as that protected by the fourth amendment exclusionary rule although the former does not depend upon governmental infringement for its application. See notes 18 & 19 supra & text accompanying. Therefore, if § 2515 is to protect the aggrieved party's privacy in a manner consistent with its constitutional importance, in spite of the uninformed congressional grant of discretion to the trial judge, the constitutional minimum for full disclosure promulgated by the *Alderman* Court ought to govern the administration of § 2515.


22. *Id.* at 171.
ment is prohibited from using;\textsuperscript{23} (3) Therefore, since absent full disclosure, there is a risk that tainted evidence may be used to convict the defendant, his fourth amendment right not to be subject to a tainted conviction requires dismissal.\textsuperscript{24} This syllogism is equally applicable to the private surveillance situation in light of the manifest congressional intent concerning § 2515.\textsuperscript{25} Accordingly, dismissal ought to be the sanction applicable to a private eavesdropper who fails to fulfill his duty to make disclosure of surveillance records prior to the suppression hearing. This is at least true where, as in \textit{Alderman}, the eavesdropper deliberately refuses to disclose surveillance records currently in his possession.\textsuperscript{26} But dismissal of an eavesdropper who is unable to produce surveillance records may raise serious questions of a denial of due process. Moreover, the eavesdropper may refuse to disclose surveillance records based on his privilege against self-incrimination, an option not available to the government in a criminal case. It is these types of failures to disclose with which this note will be concerned.

**DUE PROCESS AND DISMISSAL FOR NONDISCLOSURE**

In civil trials, the sanction of dismissal for incomplete disclosure of surveillance records could raise a due process issue. The deprivation of a defendant's property or a plaintiff's cause of action without a hearing on the merits may violate due process rights.\textsuperscript{27} Of course, no due process

\textsuperscript{23} \textit{Id.} at 183.
\textsuperscript{24} \textit{Id.} at 184.
\textsuperscript{25} The syllogism can be employed as follows where the aggrieved party's privacy has been infringed by private electronic surveillance: (1) The eavesdropper cannot build his case against the aggrieved party with evidence gained as a result of a violation of that party's right of privacy, 18 U.S.C. § 2515 (1970); (2) When the aggrieved party is not armed with the product of full disclosure, the suppression hearing may not adequately identify all of the evidence which the eavesdropper is prohibited from using; (3) Therefore, since absent full disclosure there is a risk that tainted evidence may be used to win the case against the aggrieved party, the importance of his privacy right under § 2515 not to be subject to a loss of substantive rights under the auspices of a tainted judicial proceeding requires dismissal. \textit{See} note 18 \textit{supra} & text accompanying.

\textsuperscript{26} As of this date the Supreme Court has not had to apply the principles in \textit{Alderman} v. United States, 394 U.S. 165 (1969), to a situation where surveillance records bearing on the case against the defendant could not be produced because of their loss or destruction. But at least two lower federal courts have indicated that dismissal will not be imposed for a failure to produce wholly irrelevant records. \textit{See} United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950); United States v. Sellers, 315 F. Supp. 1022, 1023 (N.D. Ga. 1970) (interpreting \textit{Alderman}).

issue is presented by dismissing a civil litigant whose incomplete disclosure is willful and deliberate. A court may reasonably infer that a civil litigant who deliberately refuses to disclose surveillance records does so because the records would show that the evidence he needs to win his case is inadmissible. Since it is inferred that he would lose at trial, the eavesdropper cannot object that dismissal for nondisclosure deprives him of any substantive rights.

However, even when the failure to disclose is not willful and deliberate, dismissal may be required. Regardless of the eavesdropper's good faith efforts to produce surveillance records which may have been lost or destroyed, the court should presume that unproduced tapes will reveal the taint of the eavesdropper's evidence. This presumption is justified for three reasons. First, it remains possible that the undisclosed surveillance records would aid the victim in discovering that part of the eavesdropper's evidence which was illegally obtained. If a court over-

differently than defendants in determining whether dismissal should be granted.

Compelling one to forego a cause of action does not, to me, differ essentially from compelling one to relinquish a defense. In either event, one may be effect-
ively deprived of his property. The right of a defendant to resist an unfounded claim is no greater than that of a plaintiff to prosecute a meritorious one. No lesser wrong results from preventing plaintiff from recovering that which in law is his than permitting a defendant to retain that which rightfully belongs to plaintiff.

Id.


29. Cf. id. The Court said that dismissal was justified in the case of willful failure to disclose information on the ground that an inference could be drawn from such willful failure that the untruth or bad faith of the failing party's allegations would be shown by the undisclosed information. Id. at 350-51. The Court's decision has been interpreted to mean that when an inference can be drawn that information not produced would be so damaging that the failing party would lose on the merits, then dismissal is appropriate. Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 53 COLUM. L. REV. 489, 483 n. 6 (1958). See also Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 62-63 (2d Cir. 1971), rev'd on other grounds, 93 S. Ct. 647 (1973).

looks this possibility, it risks admitting tainted evidence at trial because the victim may have been unable to identify such evidence at a suppression hearing.31 Proceeding to trial when such a risk exists would inadequately protect the victim's privacy interests as contemplated by § 2515.32 Second, the eavesdropper's duty to disclose tapes is a duty to preserve them prior to requested disclosure.33 This duty imposes a heavy burden on the eavesdropper to show an absence of negligence in procedures used to preserve such tapes.34 Moreover, in light of their importance in the disposition of the case, a negligent failure to preserve the tapes would justify the sanction of dismissal.35 And third, the eavesdropper has the burden of showing that his evidence is not tainted.36

In deference to the eavesdropper's due process rights, however, he must be given the opportunity to rebut the presumption. Thus, when the eavesdropper can show (1) that he had no arguable control over loss or destruction of missing records and (2) that missing tapes are not relevant to the case, then dismissal is both unnecessary and inappropriate.


32. A court ruling on a motion to dismiss for failure to produce information not obtained through illegal surveillance may deny the motion where the failure is non-willful because the trial judge can use methods other than dismissal to avoid prejudice to the party seeking discovery. Societe Internationale v. Rogers, 357 U.S. 197, 212-13 (1958). However, where there is illegal surveillance, proceeding to trial without full disclosure simply because the failure to disclose was not willful would constitute a serious abridgement of the privacy interests protected by § 2515. See notes 22-25 supra & text accompanying. Because of the importance of such interests, this abridgement should not be tolerated. See note 20 supra. Thus, where there is illegal surveillance, the court must examine circumstances beyond the reasons for the eavesdropper's failure to disclose in order to carry out the mandate of § 2515.
34. Id. at 652.
35. Among the factors to be considered when selecting the sanction to be imposed for a negligent failure to preserve discoverable information are (1) the degree of negligence involved and (2) the importance of the material lost. United States v. Bryant, 439 F.2d 642, 653 (D.C. Cir. 1971). Because a single tape may yield tainted evidentiary fruit extending to the entire case against the aggrieved party, the loss of such a tape deprives the aggrieved party of evidence which can effectively dispose of the case against him in the suppression hearing. Thus, a negligent failure to preserve any of the surveillance records warrants dismissal in light of its critical importance.
Cf., Campbell v. Johnson, 101 F. Supp. 705 (S.D.N.Y. 1951), which may be suggesting that mental states such as gross negligence can support a dismissal though it is less amenable to an inference of the type employed in Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), than a willful failure to comply with a production order. Campbell v. Johnson, supra at 707. See also Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 860 (5th Cir. 1970).
Arguable Control

Initially, the trial court ought to consider the eavesdropper's arguable control over the loss or destruction of unproduced surveillance records. Where the eavesdropper is unable to disclose because the surveillance records have been lost or destroyed, the court should consider whether the eavesdropper could have prevented their loss. Where an eavesdropper had control of surveillance records which have been destroyed, such loss should be treated as presumptively negligent because of the eavesdropper's duty to preserve the surveillance records. Upon determining that the eavesdropper's negligence caused the loss or destruction, the court may infer from the failure to preserve the tapes that their loss was occasioned by the eavesdropper's desire to prevent the court from discovering the inadmissibility of his evidence. Thus, the court's inquiry is ended and dismissal ought to be imposed. But if the eavesdropper can demonstrate that he exercised due care over the records and their loss was fortuitous, or if he can show that he had no control over them—as, for example, where they are lost while in police custody—the court may then make further inquiry to determine their relevance to the case.

Irrelevance

Irrelevance may be shown in either of two ways. First, if the court determines that none of the tapes produced are relevant and that such tapes are representative of the total, then the court may infer that those tapes which cannot be produced are similarly irrelevant. If surveillance records already produced bear no relevance to the controversy before the court, those which cannot be produced are very likely to be irrelevant as well. Dismissal for nonproduction under such circumstances would be inappropriate. However, before inferring irrelevance the court should also determine whether the tapes produced are representative of the

37. The eavesdropper has a duty to fully disclose surveillance records. See note 20 supra & text accompanying. Thus, it is his duty to preserve such records prior to a request for disclosure. Cf. United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971).
39. Although this possibility always exists when damaging information is sought, it is greater when the information is sought from an eavesdropper who has already shown his propensity to violate the law. A prerequisite to the production of surveillance records is that the victim make a prima facie showing that eavesdropping has occurred. United States v. Goldstein, 120 F.2d 485, 488 (2d Cir. 1941).
40. See note 35 supra.
41. United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950); United States
total. In making this determination, the court should consider the proportion of unproduced tapes to those which have been disclosed. The larger the percentage of produced tapes, the more likely they are to be representative of those which have not been disclosed. But if any of the produced tapes are relevant to the case, the irrelevance of the missing tapes cannot be inferred. Since it would then be possible to predict that some portion of the missing tapes might be relevant, proceeding with a hearing on the merits under such circumstances may create an unreasonable risk that the court will admit tainted material into evidence. Rather than accept this risk, the court should dismiss the case against the victim even though the incomplete disclosure is not the fault of the eavesdropper.

Second, the eavesdropper, through reliable testimony or otherwise, may be able to produce evidence concerning tape contents which indicates that they are not relevant to the case before the court. While information provided to supplant missing tape contents will be relatively worthless to the victim in light of the need for absolute accuracy, information provided to characterise tape contents can acceptably and reliably prove the irrelevance of a missing tape. For example, testimony affirming the date on which eavesdropping took place might reveal the impossibility that a missing tape is related to the substance of the case.

In sum, when the eavesdropper can overcome the presumption of taint by showing, in the prescribed manner, that there is no significant risk that tainted evidence will be admitted, the court should proceed to a trial on the merits in deference to the eavesdropper's due process rights. But when such a risk exists, the court should dismiss the eaves-
dropper in order to protect a victim's privacy rights guaranteed by § 2515.

**Self-Incrimination**

When disclosure of surveillance records is ordered, the eavesdropper is likely to withhold the records under an assertion of his privilege against self-incrimination since disclosure amounts to an admission of unlawful activity. He may argue that the sanction of dismissal for incomplete disclosure imposes an impermissible burden on the exercise of his constitutional privilege. Superficial support for this argument can be found in cases holding that public employees may not be discharged merely because they invoke their privilege against self-incrimination. In the final analysis, however, a constitutionally impermissible cost on the eavesdropper's privilege is not imposed when he is faced with the choice of disclosure or dismissal.

The eavesdropper's argument is based on the analysis of some commentators who have read cases concerning dismissals of public employees as prohibiting state and federal courts from striking a civil litigant's pleadings because of his assertion of the privilege against self-incrimination. In *Malloy v. Hogan,* the Supreme Court stated that "no penalty" could be imposed on a party exercising his right to remain silent. In *Spevack v. Klein,* the Court, in dictum, explained "penalty" to mean anything which makes the assertion of the privilege "costly." Despite the Court's broad language, however, this case was decided on

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47. I would have no knowledge of [motions to suppress in a civil case] since it would be illegal in the state of New York [to engage in private wiretapping], and no one would admit to use of such equipment in a civil case because it would immediately subject them to criminal prosecution. *Wiretapping, supra* note 1, at 136.

Disclosure of surveillance records would indicate that the person making disclosure had engaged in illegal electronic surveillance in violation of 18 U.S.C. § 2511 (1) (a). In addition, disclosure would prove useful in showing possession of eavesdropping equipment in violation of 18 U.S.C. § 2512 (1) (b).


50. Id. at 8.

51. 385 U.S. 511 (1967).

52. Id. at 515. The Court said that the concept of "costly" extended beyond fines or imprisonment, but it did not say whether loss of property without a hearing was an impermissible cost. *Id.*
the narrower ground that deprivation of livelihood could not be the price for exercising the right against self-incrimination. In *Gardner v. Broderick*, the Court repudiated the broad language of *Spevack* while reaffirming the narrow principle that deprivation of livelihood is a cost which cannot be imposed on the exercise of the privilege.

In addition to the Court’s unwillingness to expand the concept of impermissible cost following *Gardner*, a careful reading of earlier employment discharge cases indicates that the Court is willing to impose some costs on an assertion of the privilege in civil cases. These earlier cases show that discharge will be allowed when job unsuitability can be presumed from the employee’s silence. As Professor Orfield observed of those cases:

> While the Supreme Court has insisted that no inference of guilt may be made as to one who invokes the privilege against self-incrimination, it has been willing to permit the imposition of severe economic penalties upon those who invoke the privilege. Its rationale is that it is not because of the claim of privilege, but because the refusal to answer questions deemed appropriate may be regarded as evidence of incompetence, of lack of candor where there is a duty to disclose, or of unwillingness to supply information relevant to a judgment of fitness.

Thus, when an employee’s refusal to testify could support a statutory presumption of job unsuitability, the Court has permitted the discharge regardless of the privilege against self-incrimination.

These earlier cases may be reconciled with those of the later *Spevack-Gardner* line of cases in such a way that the eavesdropper’s situation can be shown to be more properly analyzed in light of the earlier cases. In the later cases, the employee was discharged upon claiming his privilege with no determination that he was otherwise unsuitable for em-

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53. 385 U.S. at 514.
55. Id. at 278. An identical result was reached in the companion case of Uniformed Sanitation Men's Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 285 (1968) (Harlan, J., concurring).
57. See, e.g., Nelson v. County of Los Angeles, 362 U.S. 1, 6 (1960); Lerner v. Casey, 357 U.S. 468, 475-76 (1958). Commentators have read *Lerner* and *Nelson* as cases where the Supreme Court upheld the validity of statutes which created a conclusive presumption of job unsuitability for a refusal to answer questions regarding an employee's fitness for continued employment. See note 56 supra & text accompanying. *But see Donnici, supra* note 48, at 27.
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Thus, in those cases it was clear that the employee had been deprived of a job which he was still entitled to hold except for his claim of the privilege. But in the earlier cases it was statutorily presumed from the employee's silence that he was no longer a suitable employee. Thus, by statutory definition he had not lost a job which was rightfully his. Hence, no cost or at least no constitutionally unacceptable cost was imposed on his exercise of the privilege against self-incrimination. It therefore follows that when dismissal of an eavesdropper's case is based on the presumption that his evidence is tainted, rather than his assertion of the privilege against self-incrimination, dismissal does not impose an impermissible cost upon the eavesdropper's privilege. Indeed, a logical corollary of the presumption of taint is that a suppression hearing where the victim is armed with the product of full disclosure would reveal that the eavesdropper has insufficient independently obtained evidence to win his case on the merits. Consequently, dismissal for failure to disclose based on such a presumption deprives the eavesdropper of no legally provable cause of action or defense to liability, and therefore, no cost is imposed on the exercise of the privilege.

Even if, for various reasons, the court does not wish to use a presumption of taint in situations where the privilege against self-incrimination is asserted by the eavesdropper, it has been suggested by some commentators that in civil cases the full protection of the privilege does not require a refusal to draw an inference unfavorable to the party asserting the privilege where that party has the burden of proof on the issue in question. It should be noted that in any civil proceeding

58. Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. Uniformed Sanitation Men's Ass'n v. Comm'r of Sanitation, 392 U.S. 280, 283 (1968). Other examples of such language are abundant. E.g., Gardner v. Broderick, 392 U.S. 273, 278 (1968).

59. Typical of these cases is Nelson v. County of Los Angeles, 362 U.S. 1 (1960). The Court described the operation of the statute as follows: [The California statute] require[s] the employee to answer any interrogation in the field outlined. Failure to answer "on any ground whatsoever any such questions" renders the employee "guilty of insubordination" and requires that he "be suspended and dismissed from his employment in the manner provided by law." Id. at 6.

60. Such a presumption could be justified on the first and third of the three grounds available for the same presumption utilized when the eavesdropper is unable to produce lost or destroyed surveillance records. See notes 30-32 & 36 supra & text accompanying.

61. E.g., Note, supra note 48, at 340.

There is a very great difference between a presumption of taint, like that justified in the text accompanying notes 30-36 supra, and an inference of taint, suggested here. See BLACK'S LAW DICTIONARY 917-18 (rev. 4th ed. 1968).
such as a suppression hearing in which a privilege against self-incrimination is asserted, the issue of criminal guilt is collateral to the ultimate issue in question. Thus, in a civil trial inferences drawn from silence based on a privilege against self-incrimination can go either to the issue of liability or to the claimant's guilt. The former is permissible\(^2\) while the latter is unconstitutional.\(^3\) Consequently, if the burden of proof on the ultimate question in a suppression hearing—whether the eavesdropper's evidence is of independent origin—rests with the eavesdropper, his refusal to disclose would permit the court to dismiss him based on a permissible inference that all of his evidence is tainted.

In criminal cases where the defendant is the victim of illegal government surveillance, the burden of proof on the issue of the propriety of the evidence to be used at trial is on the government.\(^6\) Both of the grounds which justify imposing such a burden on the government are applicable to parties in civil disputes who engage in electronic surveillance activities. First, the eavesdropping party has been shown to be a wrongdoer vis-à-vis his opponent. Second, he has exclusive possession of information showing what evidence he has independently acquired, if any.\(^5\) Accordingly, the nongovernmental eavesdropper can fairly be required to prove the independent origin of the evidence he intends to use at trial. Therefore, adverse inference on the issue of the admissibility of the eavesdropper's evidence might be appropriate upon a refusal to disclose, and dismissal could justifiably be ordered.\(^6\)


\(^{64}\) See, e.g., Alderman v. United States, 394 U.S. 165, 183 (1969); United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950); United States v. Goldstein, 120 F.2d 485, 488 (2d Cir. 1941).

\(^{65}\) It appears to us that this should be the rule in analogy to the well-settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared.

United States v. Goldstein, 120 F.2d 485, 488 (2d Cir. 1941).

\(^{66}\) Commentators advocating the use of adverse inference often do so by analogy to an inference permitted to be made by a jury upon a party's failure to testify at trial. See, e.g., Comment, supra note 48, at 79. But there is no reason why the inference should not be available to the trial judge when there is a failure to produce information in pretrial. However, to say that an inference is available does not imply that it ought to be employed. Drawing an inference that an eavesdropper's evidence is tainted from the fact that he has refused to disclose surveillance records based on his privilege against self-incrimination is a risky proposition. Inference, after all, is a process of reasoning by which a fact or proposition sought to be established
Finally, not only is dismissal for nondisclosure compatible with an eavesdropper's privilege against self-incrimination, but allowing the privilege to block disclosure would totally emasculate § 2515's protection of a victim's privacy rights. Permitting the privilege to completely bar disclosure of surveillance records to the victim would preclude his effective participation in the adversary suppression proceedings which are essential to identify tainted evidence. It therefore seems unlikely that a dubious assertion of the privilege against self-incrimination would be allowed to thwart § 2515 and thus override the privacy rights of a victim.

SUMMARY

To fully protect the right of privacy in wire and oral communications guaranteed by § 2515, it will sometimes be necessary for the trial judge to dismiss an eavesdropper who fails to disclose surveillance records to his victim. Such dismissal, while not an undue burden on the eavesdropper's privilege against self-incrimination, may raise questions concerning the eavesdropper's due process rights. Although dismissal for a willful and deliberate failure to disclose poses no due process problems, when the failure is not purposeful the trial judges should examine the circumstances of the failure to determine whether the eavesdropper could have prevented loss or destruction of surveillance records. When the failure to disclose is not the fault of the eavesdropper, the court should employ a presumption that his evidence is tainted. The eavesdropper may overcome this presumption only by a showing that there is no significant risk that undisclosed surveillance records are relevant to the dispute before the court.

With the passage of § 2515, Congress has taken a major step toward protecting the privacy rights of civil litigants. Courts must now implement the requirements of the statute in a manner that will properly balance the rights of an eavesdropper and his victim.

Mark J. Rogers