

THE WHITE HOUSE  
WASHINGTON

August 13, 1975

MEMORANDUM FOR:

THE PRESIDENT

FROM:

PHILIP W. BUCHEN *P.W.B*

SUBJECT:

Warrantless Electronic Surveillance

I. BACKGROUND

As a result of letters to you on September 18, 1974, and December 10, 1974, from Attorney General Saxbe, you addressed the question of the terms under which you would confirm his authority as delegated from you to approve warrantless electronic surveillance in the U. S. Thereupon you issued a memorandum to the Attorney General on the date of December 19, 1974. This required the Attorney General, before approving any particular surveillance, to satisfy himself that the action was necessary to obtain foreign intelligence information deemed essential to the security of the nation or to protect national security information against foreign intelligence activities or to obtain information which the Secretary of State had certified "is necessary for the conduct of foreign affairs matters which are important to the national security of the U. S." Another limitation is that the target of the warrantless surveillance has to be "assisting a foreign power or foreign-based political group or plans unlawful activities directed against the foreign power or foreign-based political group."

..... A  
..... copy of your memorandum is attached at Tab A.

II. Operating Experiences Under the December 19 Memorandum

After Attorney General Levi came into Office, he raised certain questions as to the adequacy of the stated justifications for various surveillances which he was then asked to authorize, most of which involved renewals of on-going activities but some of which represented new proposals.

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With PORTIONS EXEMPTED  
E.O. 12958 Sec. 1.5 (c)(d)

*MR 94-154 #11 NSC Ltr. 5/15/98*

*By KBH NARA, Date 7/22/98*

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When these questions were raised, the Department of Defense for the first time found out about the memorandum which had been recommended by Henry Kissinger and Phil Areeda, but which had not been cleared in advance with the Defense Department. The Defense Department raised questions as to how far it had to go in its justification to satisfy the criteria set forth in your memorandum. The differences between the Defense Department and the Attorney General were resolved by having the requests in question certified to by the Secretary of State "as necessary for the conduct of foreign affairs matters which are important to the national security of the U. S."

When your memorandum had been drafted, it was thought that this foreign affairs test, as distinguished from the test involving information deemed essential to the security of the nation, would need to be used rarely, if ever. Thus, it appeared that the memorandum has come to be applied in a manner different from that intended and in a way which Henry Kissinger now finds objectionable.

Another problem arose because the original memorandum by you was based in part on a State Department memorandum of December 6, 1974, which expressed the opinion that  
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on Diplomatic Relations of 1961 to which 113 nations, including the U. S., are parties.

Attorney General Levi recently received some indication from attorneys in the State Department that the previous opinion about the non-applicability of this treaty might be challenged by a Court or by the Congress. There is no doubt that the treaty is without effect if the  
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III. Effect of Recent Court Decision

On June 23, 1975, the U. S. Court of Appeals for the District of Columbia reversed a lower Court decision and declared unconstitutional warrantless electronic

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surveillance of the Jewish Defense League even though the League was involved in violent harrassment of officials of foreign governments, which in turn could have brought upon the U. S. adverse foreign consequences. The holding of the case is limited to a domestic organization that is not the agent of or is not acting in collaboration with a foreign power. Because your earlier memorandum did not draw the line at this point, Attorney General Levi sent you a letter dated June 25, 1975, Tab B. In this letter he advises that the current practices under your memorandum have in fact complied with the holding in the Zweibon case and that he would not in the future authorize any activities contrary to the Zweibon holding.

I immediately advised the Attorney General that you would want him to continue complying with the holding in the Zweibon case, even though the case might be appealed, but that I would not recommend amending your memorandum to make this point alone so long as there were other changes that concerned agencies would soon be recommending to you. The Attorney General concurred in deferring the issuance of an amendment to your memorandum of December 19, 1974, because he wanted further time to consider the implications of the Court's opinion in the Zweibon case. He also called attention to the fact that he was in discussion with Congressional committees concerned with possible legislation on the subject and that a revision of your memorandum should be considered in light of possible Congressional action.

The Attorney General's views concerning the problems of warrantless electronic surveillance have most recently been incorporated in an address he prepared to deliver to the American Bar Association on August 13, 1975, Tab C - pgs. 11-18. Based on these views the types of surveillance you authorized in your memorandum of December 19, as modified in practice to conform to the holding in the Zweibon case, are clearly within the limits set by decided Court cases; but still, there is a clear signal from some of the judges in the Zweibon case that judicial warrants may be required in other circumstances as well.

The Attorney General is now in the process of preparing additional recommendations to you. These, of course, will be coordinated with the State Department, the Defense Department and the CIA, so that a fully staffed recommendation can be made to you for whatever changes will be necessary or desirable in your existing memorandum to the Attorney General.

IV. CONCLUSION

The foregoing does not recommend action on your part now, but it merely serves to advise you of the present situation and the preparations being made to provide you in the near future with some recommendations.

Attachments

Old Bucken Files Box #26  
Mail Security Chron File (3)  
Bucken to GRF 8/13/75

Warrantless  
(electronic surveillance)