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FBI Guidelines Committee

*To O. P. Lawton
by 9/14/76
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Fourth Amendment implications of use of FBI agents
and assets in foreign intelligence and counterintelli-
gence cases.

The FBI has informally raised with the Guidelines Committee a series of questions concerning the extent to which FBI agents and assets in foreign intelligence and foreign counterintelligence cases may undertake to search property or seize or copy information without a judicial warrant. While many of the questions can be answered in the context of existing court interpretations of the Fourth Amendment as applied to criminal cases, the most difficult questions raise the issue of whether the President has inherent constitutional authority to authorize searches and seizures to protect the national security in foreign intelligence and counterintelligence cases and, if so, whether this authority can be exercised by the Attorney General.

As discussed below, it is our view that there is inherent presidential authority to conduct certain searches and seizures of personal property and information of known intelligence agents, either through the use of FBI agents or by taking advantage of opportunities available to persons who agree to cooperate with the FBI under carefully restricted circumstances. Further, it can be argued that the authority to authorize such searches and seizures has been vested in the Attorney General by Executive Order 11905 although it must be recognized that the Order is not explicit in this regard and a more specific delegation of authority would be desirable.

When personal property, documents or other information has been entrusted to a person who is willing to cooperate with the FBI, reliance on this inherent authority will not always be necessary. If the individual has been entrusted with access to, as well as custody of, the property, documents or information he may consent to its search by the FBI

under traditional standards of the Fourth Amendment as applied in criminal cases. Similarly, the FBI would be permitted in criminal cases to accept the fruits of a search or seizure conducted by an individual without government direction or suggestion, even though the same search would violate the Fourth Amendment if conducted by federal agents, and it seems clear that this same rule would apply in foreign intelligence or foreign counterintelligence cases.

A. Searches and Seizures Based on Inherent Authority.

In criminal cases a judicial warrant is required before federal agents may search or seize property unless there are exigent circumstances, consent has been given, or the property is truly abandoned. The warrant requirement applies to searches conducted within premises to which the agent has obtained access by pretext, Gouled v. United States, 255 U.S. 298 (1921), and to searches conducted by persons who are not government agents but who act at the government's behest, Corngold v. United States, 367 F.2d 1 (C.A. 9, 1966). In such cases, the judicial warrant clause of the Fourth Amendment is an integral part of the reasonableness requirement. United States v. United States District Court, 407 U.S. 299, 315 (1972).

The Supreme Court has declined to address the question whether the reasonableness requirement of the Fourth Amendment encompasses the judicial warrant clause when activities of foreign powers or their agents are the target of the search or seizure. Keith, supra at 321-322. Two circuits have held, however, that the President's unique constitutional responsibilities in the area of foreign affairs vest him with the power to authorize seizures in the form of national security wiretaps without the necessity of obtaining a judicial warrant which would ordinarily be required. United States v. Butenko, 494 F.2d 593 (C.A. 3, 1973), cert denied sub nom. Ivanov v. United States, 419 U.S. 881; United States v. Brown, 484 F.2d 418 (C.A. 5, 1973), cert denied, 415 U.S. 960. Of course, there is dictum in the plurality opinion in Zwiebon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) to the contrary, but the holding of the case rested narrowly on the domestic nature of the investigation.

The cases upholding an inherent presidential power to authorize seizures absent a judicial warrant are limited to the electronic surveillance context. It is doubtful that they could be read to authorize an all-purpose "writ of assistance" or a trespassory search of real property in violation of 18 U.S.C. 2236. On the other hand, it is our view that the acquisition of information from documents, code books or personal observation of maps, devices or personal property to which the government acquires access through the use of an asset is analagous to the surreptitious seizure of conversations intended to be private by means of electronic surveillance. Under carefully controlled circumstances, we believe searches of personal property and seizures of documentary or other information would be upheld as within the inherent national security authority of the President where the foreign intelligence or counterintelligence needs of the United States are clear.

Admittedly, a court's willingness to accept the reasonableness of reliance on inherent presidential authority is likely to rest on the facts. Opening a sealed package entrusted to a courier by a known agent of a hostile foreign power and delivered to the government by that courier is more likely to be viewed as reasonable under the Fourth Amendment than would the surreptitious search of the desk of a United States citizen suspected of espionage. Similarly, the photographing or purloining of a code book from an establishment of a hostile foreign power by an asset having legitimate access to the premises, but not authorized access to the code book, would likely be viewed as more reasonable than the theft of a locked briefcase from the office of a government employee suspected of passing on classified information. This is not to suggest that the protections of the Fourth Amendment are limited to United States citizens, see United States v. Toscanino, 500 F.2d 267 (C.A. 2, 1974). Rather, courts will look to the extent of the national security interests involved and the reasonableness of reliance upon inherent authority rather than the traditional judicial warrant approach. The government's case for acting on inherent authority in intelligence cases relating to foreign agents who are foreign officials or visitors in this country and, by reason of their status, unlikely to be prosecuted or proceeded against in the traditional manner of criminal investigations is stronger than it is with respect to our own citizens.

We recognize that the circumstances in which inherent authority to search and seize pursuant to the president's power to protect the national security must be carefully circumscribed and that procedural safeguards must be established. If this is done, however, it is our view that the Fourth Amendment, as interpreted in Butenko and Brown, permits searches and seizures on the basis of presidential authorization.

B. Delegation of Presidential Authority.

There is presently no explicit document, such as exists with respect to electronic surveillance, detailing the circumstances under which the Attorney General may exercise the President's authority in national security cases. It has been suggested that no such document is necessary. This Circuit implied in United States v. Ehrlichman, No. 74-1882, D.C. Cir. 1976, (slip op. at 28), that the Attorney General is, as a matter of constitutional law, the alter ego of the President in foreign counterintelligence and foreign intelligence cases and thus has authority to authorize a search or seizure without a warrant. Reliance need not be placed on this theory, however, since Executive Order 11905 can be read as vesting such authority in the Attorney General.

That Order defines foreign counterintelligence as activities conducted to protect against foreign espionage, sabotage and subversion (§ 2(a)(2)) and authorizes the FBI, under the supervision of the Attorney General to detect and prevent such activities within the United States through lawful counterintelligence activities (§ 4(g)(1)). Intelligence agencies other than the FBI are permitted to engage in counterintelligence activities within the United States only with the approval of the Attorney General (§ 4(b)(4)). These agencies may engage in counterintelligence activities outside the United States but if these activities include "unconsented physical searches" abroad of United States citizens (and there is the clear implication that they might) this must be done under procedures approved by the Attorney General. (§ 5(b)(3)). The Order recognizes that unconsented physical searches may be encompassed in the legitimate counterintelligence activities of the United States. Where such searches may be engaged in by other agencies the Order explicitly places supervisory responsibility in the Attorney General. It is not as explicit with respect to activities by the FBI in the United States but it does vest full counterintelligence responsibilities in the FBI and authorizes all lawful measures not only to detect actual

offenses but to prevent the activities of foreign intelligence services, again placing supervisory control in the Attorney General. In a public order which cannot be as detailed as a classified instruction, this is sufficient evidence that the President has delegated to the Attorney General such authority as he has to authorize unconsented physical searches and seizures. This is not to suggest, of course, that a more explicit delegation might not be desirable. A specific directive would avoid any ambiguity in Executive Order 11905.

As defined in the Executive Order, the Attorney General's role is to exercise supervision and establish guidelines and procedures. The Order does not specify whether this is to be done by the issuance of "standing instructions" or by case-by-case approval. Nevertheless, the emphasis in Ehrlichman, supra, on explicit authorization seems to suggest that the Attorney General's approval for searches and seizures in foreign counterintelligence or foreign intelligence cases should be exercised on a case-by-case basis wherever possible and that, where exigent circumstances which would dispense with the need for a traditional judicial warrant even in criminal cases are relied upon, these should be as carefully defined in guidelines as is possible.

C. Search and Seizure Under Traditional Criminal Standards

As indicated at the outset, many of the questions which arise in connection with counterintelligence and foreign intelligence cases regarding search and seizure are not dependent on the matter of inherent presidential authority for resolution. There are circumstances in which the FBI, acting directly through its agents or through assets or other persons willing to cooperate, may search property or documents and retain the information acquired.

Information furnished by an asset or other cooperating individual on the basis of his personal observation or participation in conversations may be accepted by and used by the FBI regardless of whether the individual volunteers the information or was specifically instructed to obtain it. Hoffa v. United States, 385 U.S. 293 (1966); United States v. White, 401 U.S. 745 (1971); United States v. Haden, 397 F.2d 460 (C.A. 7, 1968), cert denied 396 U.S. 1027. Similarly, the FBI may be given access to documents by one who has official access to their contents even though the originator of the documents

did not expressly consent to FBI access. Cf. United States v. Miller, 44 L.W. 4528 (1976).

The same general principles apply where the subject of interest is personal property left unlocked in the custody of one who cooperates with the FBI and furnishes access to that property or its contents. United States v. Matlock, 415 U.S. 164 (1974) (unsealed packages left in a private home); Frazier v. Cupp, 394 U.S. 731 (1969) (bag jointly used by two parties); United States v. Gradowski, 502 F.2d 563 (C.A. 2, 1974) (car and keys temporarily left in the custody of another). All of these cases adopt the view that one who entrusts another with information or access to property, either on a continuing or temporary basis, assumes the risk that the person entrusted will provide the information to, or consent to a search of the property by, federal agents. Such consent eliminates the need for a warrant under Fourth Amendment standards.

It seems clear that the same principles of assumption of risk and consent are applicable to foreign intelligence and foreign counterintelligence cases and that neither a judicial warrant or specific authorization of the Attorney General is required, as a matter of law, when access to information, documents, or personal property is furnished to the FBI by one who has himself been given such access. Indeed, the case law suggests that access to real property may be made available by one who has been entrusted with the keys to that property or with the power to grant access, United States v. Murphy, 506 F.2d 529 (C.A. 9, 1974) cert. denied, 420 U.S. 996. There may, however, be sound reasons of policy to preclude the FBI from taking advantage of consent to access in the case of real property.

Although probable cause standards need not be met when there is a consent to the search or seizure of property or information some standards should be established to guide the FBI in its use of assets and other individuals who agree to cooperate. For example, we would suggest that the actual removal of documents, code books or similar matters for the purpose of examination by the FBI be limited to those situations in which the FBI has opened a full counterintelligence investigation or in which the originator of the information is

a foreign official or visitor from a criteria country.

There is one other situation in which the FBI may, as a matter of law, benefit from the seizure of information or property relevant to foreign intelligence or counterintelligence investigations, namely where the information or property is furnished by an individual who is not a government agent and who is not acting pursuant to government direction or suggestion. Where information is volunteered to the FBI or property is voluntarily surrendered to it by such an individual, the manner in which the individual acquired the information does not affect the legality of the FBI acceptance or use, even as evidence in a criminal case. Accordingly, information or property acquired in a manner which would violate the Fourth Amendment if done by a government agent may nevertheless be accepted and used by the government if furnished to it. United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974) cert. denied, 419 U.S. 1127. In applying this rule, of course, extreme caution is required to insure that the government has not suggested, directly or indirectly, that the information be acquired in a manner which would violate the Fourth Amendment if done by the government itself. Carefully worded guidelines and stringent reporting requirements should be able to avoid Fourth Amendment problems while at the same time permitting the government to use information of value volunteered to it.

D. Recommendation

If you approve, we will undertake to develop guidelines on the use of counterintelligence assets. We believe that it is important to delineate the situations in which case-by-case approval of the Attorney General is required prior to the acquisition of information by assets or by FBI agents acting in cooperation with assets and to provide as detailed guidance as is possible with respect to actions permitted under exigent circumstances in which prior approval cannot be obtained.