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cc: Files
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Scalia (2)
Chron.

SEP 30 1976

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Army Electronic Surveillance Procedures

I have considered the memorandum to you from John Buckley dated September 28, 1976, setting forth the conclusion of the Berk Committee with respect to the necessity for the Army's retention of complete tapes of all electronic surveillance which it conducts overseas, and setting forth the reasons for that conclusion.

For the reasons there stated I agree that the tapes need not be retained. There is no statutory or judicial requirement for such retention; and it seems to me that even a desire to do more than is strictly necessary for the protection of important constitutional rights argues against rather than in favor of retention. The only adverse consequence at law which, under current statutes and judicial decisions, would be risked by destruction of the tapes is the inability to demonstrate a lack of connection between an unlawful surveillance and the evidence used in a prosecution. It seems to me this risk is better avoided by assuring (and retaining sufficient documentation to demonstrate) the lawfulness of the surveillance; and, beyond that, by adopting minimization procedures with respect to distribution (again well documented) which would render the infection of a prosecution unlikely, even when an improper surveillance occurs.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel