

JMH:JNG:jf

cc: Harmon
Cavin
Retrieval
Pilon
Hull ✓
Files

3 AUG 1978

MEMORANDUM FOR JAMES B. ADAMS
Associate Director
Federal Bureau of Investigation

Re: Emergency Authority to Electronic Surveillance

As I promised in our discussion two weeks ago, I have looked into the questions you raised regarding the use of electronic surveillance in the recent hostage situations in Puerto Rico. The answers to your specific questions are as follows:

(1) The procedures in Title III explicitly apply to electronic surveillance in Puerto Rico. 18 U.S.C. § 2510(3). While the district court judge questioned this at first, he was apparently persuaded when shown that Puerto Rico is explicitly mentioned in the statute.

(2) Section 2510(7) of title 18 allows any investigative or law enforcement officer "specially designated by the Attorney General" to intercept wire or oral communications in an "emergency situation," provided that certain conditions are met. The Attorney General has, in Order No. 692-77 (attached hereto), authorized the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Office of Legal Counsel to approve an emergency interception of wire and oral communications when he is not in the District of Columbia or is otherwise not available.

(3) The authority conferred in 18 U.S.C. § 2510(7) obtains only where --

an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained.

Since the hostage situation in Puerto Rico posed no demonstrable threat to the national security, the emergency authority could be used only if the situation involved "conspiratorial activities characteristic of organized crime." This provision is not defined in the statute, and it is not entirely clear whether the language would allow for a resort to emergency electronic surveillance in all hostage situations. The reference to "characteristic of organized crime" could suggest that the activity must resemble the sorts of activity generally undertaken by organized criminal elements, and I am not certain that the seizure of hostages would conform to this criterion in all instances. */ Perhaps more importantly, the term "conspiratorial activities"

*/ The legislative history could also support a narrow interpretation of this provision. As originally proposed, 18 U.S.C. § 2518(7) would have allowed emergency surveillance for all crimes specified in 18 U.S.C. § 2516(1). An amendment, supported by the Department of Justice, to narrow this provision to instances involving a "threat of immediate danger to life" was defeated, for the reason that it would unduly hamper law enforcement. See Cong. Rec. 14696-99, 14720 (1968). At a later point in the debates, an amendment was offered to limit the authority in 18 U.S.C. § 2518(7) to cases of national security or "of a claimed nation-wide criminal conspiracy," 114 Cong. Rec. 14730 (1968), again with the intent of narrowing the provision. See 114 Cong.

(Footnote cont'd on p. 3)

would suggest that more than one individual must be committing or be involved in the criminal activity, and this may pose problems in situations where only one individual is holding hostages.

Of course, there are considerations here suggesting a broader interpretation. The language "conspiratorial activities characteristic of organized crime" is apparently drawn from a source which used it with reference to the offenses generally included in 18 U.S.C. § 2386(1); this may suggest that the emergency authority might be used in all or nearly all cases where electronic surveillance with a court order would be allowed. Carr, *The Law of Electronic Surveillance* § 3.07[2][c][11] at 121-22 (1977). In addition, the term "characteristic" might afford some leeway in interpretation, *id.* at 122, particularly in light of the myriad activities engaged in by organized crime which pose a danger to human life. Finally, I am informed that the courts have upheld the Department on the few occasions in which this authority was used.

*/ (Footnote cont'd from p. 2)

Rec. 14730-32 (1968) (remarks of Senator Yarborough). In response to this proposal, another amendment, containing the present language, was offered by Senator Tydings on the ground that it was a "little tighter" modification. 114 Cong. Rec. 14742 (1968). In explaining this amendment, Senator Tydings agreed that it referred to a "crime syndicate that operates on a vast scale," as opposed to "something petty." He also offered in the record, by way of further explanation, two statements which refer to "highly-organized . . . criminal cartels" such as La Cosa Nostra, and which delineate the activities engaged in by such groups -- e.g., narcotics, loan sharking, gambling, and the corruption of business, unions, and the democratic process. 114 Cong. Rec. 14742-44 (1968). It is certainly arguable that this legislative history indicates that emergency electronic surveillance authority was only to apply to such activities and not to the seizure of hostages by small, relatively unorganized groups or by individuals.

Nonetheless, I believe that the Department's authority in this area should be made as explicit as possible. I am therefore recommending, by copy of this memorandum to Patricia M. Wald, Assistant Attorney General of the Office of Legislative Affairs, that steps be taken to clarify the Department's emergency authority to act in this area, perhaps in connection with the anti-terrorism legislation which is presently under consideration by the Congress.

I believe that this responds to your inquiries. If we can be of further assistance on this matter, please let me know.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Attachment

cc: Patricia M. Wald
Assistant Attorney General
Office of Legislative Affairs