

MEMORANDUM FOR PHILIP B. HEYMANN
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16 MAR 1979

Re: Interception of Privileged Oral
and Wire Communications During
Hostage Situations

This memorandum responds to your inquiry of October 10, 1978 concerning whether investigators in a "hostage situation" may lawfully begin or continue the electronic surveillance of a kidnap suspect while the suspect is conferring with his attorney, spouse, or clergyman. A memorandum from your General Crimes Section focuses on a hypothetical kidnapping investigation in which:

- (a) the conversation to be intercepted is known to be privileged;
- (b) the suspect, except perhaps through his offense, has not waived any privilege that may attach to his conversations; and
- (c) the investigators wish to monitor his privileged conversations in toto because of the possibility that such conversations will be relevant to the safe recovery of the suspect's hostage.

As discussed below, we conclude:

1. Interceptions of privileged communications are lawful if achieved under judicial authorization or with the consent of the suspect's "confidant;"
2. Warrantless interception is lawful in truly exigent circumstances in which delay would endanger the hostage;

3. The Sixth Amendment or statutory protections applicable to a suspect's communications require only the non-disclosure of those communications, including their exclusion from evidence at trial; and

4. Government lawyers and cooperating confidants may ethically participate in the interception of privileged communications in cases in which such interceptions are judicially authorized or reasonably determined by Government investigators to be necessary to a hostage's safety.

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I. DOES THE KIDNAP SUSPECT HAVE RIGHTS?

The memorandum of the General Crimes Section suggests that the interception of a kidnap suspect's conversations

during a hostage situation is per se lawful because, while holding a hostage, the suspect is "an outlaw with no rights to assert in the course of his confrontation with the law." This proposition is too sweeping. The Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act, as amended, 18 U.S.C. §2510 et seq. (1976) [Title III], and the Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783, to be codified at 50 U.S.C. §1801 et seq. [FISA] clearly contemplate that those who have committed crimes will ordinarily continue to enjoy legal protections during the investigation of those crimes. Title III, for example, requires a warrant for the lawful interception of conversations by suspected criminal conspirators even during the course of their conspiracy. Only in limited circumstances may the interception of conspirators' conversations be initiated without a warrant, and, even in such cases, an application within 48 hours for retroactive approval of the surveillance is required. 18 U.S.C. §2518(7) (1976).

A more accurate premise is that, whatever rights a suspected kidnapper enjoys, the protections afforded his rights must account also for the countervailing rights of society and of the kidnap victim. The latter interests are necessarily most compelling while the hostage is in custody. Whatever privacy interest a suspect may have during a hostage situation in the contemporaneous non-disclosure to government authorities of his privileged conversations, his privacy interest must compete with the hostage's and society's more profound interest in the life and safety of the suspect's victim. Fewer incursions on his rights may be tolerated after his apprehension because no compelling interest exists to justify not protecting the accused at that stage.

Thus, the following discussion of a kidnap suspect's rights during a hostage situation does not assume that such a suspect may be deemed to have no rights at all, but rather that the right of the innocent victim to safety is the paramount value to be protected in the course of the kidnap investigation.

II. UNDER WHAT CIRCUMSTANCES IS THE INTERCEPTION OF PRIVILEGED CONVERSATIONS LAWFUL?

In addressing the circumstances under which the interception of privileged conversations in a hostage situation is lawful, this memorandum will consider three sources of legal protection on which a suspect might rely: the Fourth Amendment, Title III, and the FISA.

A. The Fourth Amendment

1. The Reasonableness of "Searches" for Privileged Communications

The Fourth Amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court held, in Katz v. United States, 389 U.S. 347 (1967), that the electronic surveillance of a conversation constitutes a search within the meaning of the Fourth Amendment, even if the interception requires no physical entry on private premises.

Because the Fourth Amendment proscribes unreasonable searches, the threshold issue is, therefore, whether the search for and seizure of privileged communications is ever reasonable under the Fourth Amendment. The answer is clearly affirmative. The safe recovery of a hostage is a manifestly reasonable object of a search. 1/ Such a search might reasonably

1/ At least three circuits have held that a life-saving exception to the Fourth Amendment warrant requirement exists to permit police officers to enter dwellings to render emergency aid and assistance to persons who they reasonably believe to be in distress and in need of such assistance. United States v.

(Continued)

aim for the interception of conversations reasonably likely to yield facts relevant to a hostage's safe recovery. These target conversations would likely comprise all conversations that a suspect conducts while he is holding his hostage. The privileged character of any such conversation would not mitigate its likely usefulness to investigators, and thus would not lessen the reasonableness of the search.

Assuming the reasonableness of "searching" for conversations, including privileged conversations, that are relevant to a hostage's recovery, the unavailability as evidence at trial of any intercepted conversation would also not make the search for such a conversation less reasonable. It is only since Warden v. Hayden, 387 U.S. 294 (1967), that the evidentiary usefulness of seized objects has been regarded an adequate justification for a search. Prior to Warden, searches and seizures were deemed reasonable:

only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.

Gouled v. United States, 255 U.S. 298, 309 (1921). Although any analogy between searches for conversations and for tangible property will be inexact, it might fairly be said that, during a hostage situation, the interest of the public and of the hostage in information concerning the hostage's safety is primary to the kidnap suspect's interest in the sole possession of that information, even if disclosed in apparent confidence.

1/ (Continued) Dunavan, 485 F. 2d 201 (6th Cir. 1973); Root v. Gauper, 438 F. 2d 361 (8th Cir. 1971); United States v. Barone, 330 F. 2d 543 (2d Cir. 1964), cert. denied, 377 U.S. 1004 (1964). These decisions squarely establish the proposition that the protection of life and safety is a fully adequate justification for a reasonable search.

2. The Warrant Requirement

However reasonable, a search is ordinarily subject under the Fourth Amendment to the requirement of prior judicial approval. The Supreme Court held, in Katz v. United States, 389 U.S. 347 (1967), that, as a search, electronic eavesdropping is subject to the warrant requirement. The Court went so far as to say in dicta that it is "difficult to imagine" that those exceptions to the warrant requirement that courts recognize in cases of physically intrusive searches and seizures "could ever apply" to electronic surveillance:

Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." And, of course, the very nature of electronic surveillance precludes its use pursuant to a suspect's consent.

Katz v. United States, *supra*, 389 U.S. at 357-58 (footnotes omitted). This language, if accurate, would require a warrant for electronic eavesdropping in a hostage situation, regardless of circumstances.

The Court's dicta in Katz, however, if applied inflexibly in every hostage situation, might directly contradict the Court's paramount concern with the preservation of human life and safety in cases of physically intrusive searches. The Court, in Warden v. Hayden, 387 U.S. 294 (1967), upheld a warrantless house search, conducted within minutes of the armed robbery of a nearby cab company, for the armed robbery suspect and his weapons; the Court said:

The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger the lives or the lives of others.

Id. at 298-99. In cases in which any delay in the implementation of electronic surveillance would endanger a person's

life, such exigent circumstances would seem, under Warden, necessarily to excuse warrantless surveillance.

Cases in which obtaining a warrant would further endanger a hostage should be exceedingly rare. Decisions to conduct surveillance are not likely to be instantaneous, on-the-spot decisions similar to decisions to chase a fleeing suspect into a house or to seize evidence to prevent its imminent destruction. Except in circumstances in which an extension phone is readily available to law enforcement, the time required to procure a warrant is likely not to be greater than the time required to set up the surveillance in the first instance. Thus, the urgency of a hostage situation notwithstanding, the nature of the decision-making process leading to surveillance and the time required to initiate surveillance will ordinarily preclude reliance on the "exigent circumstances" exception to the warrant requirement.

On the other hand, hostage situations may arise in which investigators reasonably conclude that any delay would seriously endanger human life. If such a circumstance exists that would justify warrantless physical entry onto private premises, there is no reason to think it would not justify equally, under the Constitution, the covert surveillance of any conversation in a private area.

The circumstances under which warrants may be obtained are discussed in §II.B, below.

3. Searches by Consent

Neither the Fourth Amendment nor any statute would protect a suspect from electronic surveillance conducted with the consent of a suspect's presumed confidant. The Supreme Court has held that the Fourth Amendment does not protect a person's privacy interest in a conversation against the revelation of that conversation by another party in whom the speaker has misplaced his trust. Hoffa v. United States, 385 U.S. 293, 302 (1966), Lopez v. United States, 373 U.S. 427 (1963). Those statutes that govern the issuance of warrants for electronic surveillance preserve the consent exception to the Fourth Amendment warrant requirement. FISA, which requires warrants

in certain cases of electronic surveillance for purposes of gathering foreign intelligence information, defines electronic surveillance to comprise only the acquisition of communications without the consent of any intercepted party or in circumstances in which a warrant would be required for law enforcement purposes. FISA, §101(f). A warrant for law enforcement purposes is not required if an intercepted party consents to the interception because Title III, by its terms, does not ordinarily cover the interception of communications to which one party has consented. 18 U.S.C. §2511(2)(c) and (d) (1976). 2/ Thus, neither statute ordinarily applies if one party to a conversation consents to its interception.

The fact that the consenting party is, in some circumstances, a legally recognized confidant does not alter the constitutional rule with respect to consent in a hostage situation. In less urgent circumstances, a client, penitent, or spouse might be able to argue that his expectation of non-disclosure with respect to a privileged communication had "a source outside of the Fourth Amendment, ... by reference ... to understandings that are recognized or permitted by society," Rakas v. Illinois, ___ U.S. ___, 99 S. Ct. 421, 430-31 n. 12 (1978), and is thus protected from seizure by the Fourth Amendment, even against voluntary disclosure by his confidant. It is implausible, however, that a court would sanction as an "understanding permitted by society" a kidnaper's right to protection against an untrustworthy "confidant" with respect to private consultations while a hostage's life and safety are at stake.

In sum, electronic surveillance of privileged communications is a "search" within the meaning of the Fourth Amendment. A search aimed at privileged communications during a hostage situation may be reasonable. Such a search is subject to a

2/ It is unlawful for a person not acting under color of law to intercept a wire or oral communication, despite a party's consent, if:

such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

18 U.S.C. §2511(d) (1976).

warrant requirement, to which only a limited exigent circumstances exception applies, unless the privileged "confidant" consents to the interception, in which case no constitutional or statutory rule protects the suspect from the interception of his conversation.

B. Compliance with the Warrant Requirement

Although the Constitution itself establishes a warrant requirement for Fourth Amendment searches, the standards for the issuance of warrants are governed by statutory law. Title III governs their issuance for law enforcement purposes; FISA governs their issuance for the gathering of foreign intelligence information. For the reasons that follow, we conclude that, where needed, a warrant for the electronic surveillance of a privileged conversation in a hostage situation may issue under either statute, as appropriate.

1. Title III

As originally enacted, Title III provided standards for the issuance of warrants in all cases except those in which the President has constitutional power to conduct surveillance for foreign intelligence purposes. Omnibus Crime Control and Safe Streets Act of 1968, Title III, §802, formerly codified at 18 U.S.C. §2511(3) (repealed 1978). ^{3/} In enacting Title III, Congress purported to follow the Supreme Court's decisions in Katz and in Berger v. New York, 388 U.S. 41 (1967), regarding the constitutional requirements for conducting covert electronic surveillance. See S. Rep. 1097, 90th Cong., 2d Sess. 66 (1968). Title III thus requires, with limited exceptions that will not include ordinary kidnappings, ^{4/} prior judicial authorization for the electronic surveillance of privileged conversations.

^{3/} The standards applicable to cases of foreign intelligence surveillance are now provided by FISA. See §II-B-2, infra.

^{4/} Title III provides warrantless surveillance authority in emergencies involving conspiratorial activities characteristic of organized crime or threatening the national security. 18 U.S.C. §2518(7) (1976). In such emergencies, the government must apply within 48 hours of beginning its surveillance for an order approving the emergency interception of communications.

Title III does not expressly state those purposes for which warrants may be sought under its provisions; we conclude, however, as discussed below, that warrants may lawfully issue under Title III for the surveillance of privileged conversations to aid in the recovery of a hostage.

First, it is evident from the provisions of Title III that some lawful interception of privileged communications is possible. Title 18, Section 2518(4) provides:

No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(Emphasis supplied.) The underlined reference necessarily implies that Congress contemplated that some interceptions of privileged communications would be lawful.

Further, it appears that judicial authorization for the interception of conversations in order to facilitate the safe recovery of a hostage would be proper under Title III. Although the government is authorized by Title III to seek warrants for electronic surveillance only when an "interception may provide or has provided evidence" of certain specified crimes, 18 U.S.C. §2516(1) (1976), Title III does not limit the issuance of warrants to investigations aimed at gathering admissible evidence for trial. The Senate Report interpreting §2516 states:

It is appropriate that no limitation be placed on the investigations in which the investigative arm of the Department [of Justice] may participate.

S. Rep. 1097, 90th Cong., 2d Sess. 97 (1968). The report indicates that §2516, governing the authority to apply for warrants, is to be read consistently with §2518, which specifies the criteria and procedures for their issuance. Section 2518(3)(b) requires the issuing judge to find:

probable cause for belief that particular communications concerning [the specified offense] will be obtained through such interception.

This standard, on its face, is broader than a requirement of probable cause for belief that evidence for trial will be adduced through the authorized eavesdrop. S. Rep. 1097, 90th Cong., 2d Sess. 102 (1968). While a hostage is in custody, probable cause ordinarily will surely exist for belief that communications concerning the kidnapping will be obtained through an interception of the kidnapper's conversations, including privileged conversations. 5/

Because authority exists to apply under Title III for the issuance of a warrant to intercept a kidnapper's conversations and because Title III does not foreclose the lawful interception of privileged communications, we conclude that a warrant to intercept privileged conversations may lawfully issue in a hostage situation.

It will be noted that Title III contains no express exigent circumstances exception to its warrant requirement. Warrantless surveillance in exigent circumstances would thus, if Title III is read literally, subject an investigating officer to at least the minimum statutory fine for violation of Title III's warrant provisions. 18 U.S.C. §2520 (1976). We conclude, however, that Congress, by enacting Title III, did not intend to proscribe constitutionally permissible warrantless eavesdropping in exigent circumstances. It is evident from the legislative history, S. Rept. 1097, 90th Cong., 2d Sess. (1968), that Congress did not directly consider the exigent circumstances

5/ Proper implementation of a Title III warrant will require the minimization of communications "not otherwise subject to interception" under Title III, 18 U.S.C. §2518(5) (1976). In Scott v. United States, ___ U.S. ___, 98 S. Ct. 1717 (1978), the Supreme Court held that compliance with the minimization requirement depends on "the agents' attempts to minimize in light of the purpose of the wiretap and the information available to the agents at the time of interception." 98 S. Ct. at 1721. In light of the purpose of a wiretap during a hostage situation, investigating agents would seem to have more leeway to monitor conversations than they would in the conduct of ordinary investigatory surveillance. To the extent feasible, however, attempts should be made not to intercept those privileged communications that are not relevant to the safe recovery of the hostage.

problem in drafting Title III; so dramatic a limitation on investigating authorities, in performing their most essential function, should not lightly be inferred from the statute's failure expressly to note an exigent circumstances exception.

It is further evident from the Senate Report that Congress intended to give the Department of Justice the maximum investigating authority consistent with constitutional protections. Id. Congress, for example, provided for 48 hours' emergency surveillance authority in limited cases, 18 U.S.C. §2518(7) (1976), relying on the rule with respect to physically intrusive searches that permits police to conduct emergency warrantless searches to avoid the imminent destruction of contraband or other evidence, Id. at 104; Schmerber v. California, 384 U.S. 757 (1966); Carroll v. United States, 267 U.S. 132 (1925). Because the life of a hostage is a weightier interest than the conviction of an offender, Congress' reasoning with respect to those emergency cases it did consider implies that, had it considered the question, Congress would have reserved to investigators the authority to conduct warrantless surveillance in those rare, but possible cases in which any delay would seriously endanger the hostage.

2. FISA

It is possible that a kidnapper's conversations during certain hostage situations, including privileged conversations, would constitute "foreign intelligence information" as defined in §101(e) of FISA. 6/ In such cases, §105 of FISA would provide an alternative procedure for procuring a surveillance warrant. Under FISA, the warrantless surveillance of conversations is permissible only if directed at the acquisition of communications.

6/ Foreign intelligence information includes, for example, "information that relates to, and, if concerning a United States person, is necessary to the ability of the United States to protect against ... (3) ... international terrorism by a foreign power or an agent of a foreign power" FISA, §101(e). "International terrorism," as expressly defined by FISA, may clearly involve kidnapping. §101(e)(2)(C).

transmitted by media used exclusively by or among foreign powers, and there is no substantial likelihood that the surveillance will intercept conversations to which a United States person is a party, §102(a)(1). Because this exception will likely apply rarely, if at all, to hostage situations in this country, investigators in virtually every case should be prepared to seek judicial authorization for surveillance under FISA or Title III during a hostage situation.

In sum, the interception of privileged communications during a hostage situation is lawful if:

1. Achieved pursuant to judicial authorization under Title III or FISA;
2. Achieved with the consent of the privileged "confidant";
3. Achieved without warrant when truly exigent circumstances preclude a prior application for judicial approval; or
4. Achieved without warrant in cases in which the communications occur over media used exclusively between or among foreign powers, and no substantial likelihood exists that surveillance of such communications will acquire the contents of communications to which a United States person is a party.

III. EXCLUSION OF INTERCEPTED COMMUNICATIONS AT TRIAL

It is anticipated that the surveillance of privileged communications would most often occur pursuant to a warrant issued under Title III or FISA, or with the consent of the suspect's presumed confidant. In either event, it is clear that testimony regarding the intercepted conversation cannot be introduced at trial. FISA provides:

No otherwise privileged communication obtained in accordance with or in violation of the provisions of this title shall lose its privileged character.

§106(a). Title III contains nearly identical language. 18 U.S.C. §2518(c). In cases of consenting confidants, the confidant, although he may permit the lawful interception of an otherwise privileged communication, is without authority to waive the privilege without the consent of the speaker-suspect.

A further question arises, however, whether any evidence derived from the interception of privileged communications must also be barred. Although no case law exists squarely in point, we conclude that the answer is affirmative.

First, a constitutional rule may protect the suspect from the indirect use of intercepted attorney-client communications. Although no court has held that the Sixth Amendment right to the assistance of counsel automatically bars prosecutions of persons whose lawyer-client communications have been intercepted, cf., Coplon v. United States, 191 F. 2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952), the Supreme Court has said:

If anything is to be inferred from [Black v. United States, 385 U.S. 26 (1966) and O'Brien v. United States, 386 U.S. 345 (1967)] with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial.

Weatherford v. Bursey, 429 U.S. 545, 552 (emphasis supplied). Some question exists as to the precise applicability of the above rule because the passage is dicta in Weatherford, and it may be argued that the Sixth Amendment does not protect any lawyer-client communications prior to the institution of adversary proceedings, Brewer v. Williams, 430 U.S. 387 (1977). However, excluding the "fruits" of the interception of privileged communications would be prudent with respect to the policy underlying the Sixth Amendment. Because compliance would likely not compromise federal law enforcement, given that, in the circumstances hypothesized, federal investigators would already have amassed independent evidence of the suspect's identity and offense, we would strongly recommend, on constitutional

grounds alone, that privileged attorney-client communications not be used to derive evidence, even indirectly, to be introduced at trial. 7/

It may be, however, that the scope of the common law privilege itself prevents the use of any "fruits" of intercepted privileged conversations, whether with attorneys, clergymen, or spouses. The purpose of the common law privileges was the protection of those confidential relationships to which the privileges applied. To the extent that the availability at trial of evidence derived from privileged communications undermines those relationships, the scope of the privileges ought to be deemed to encompass the derivative evidence as well. For example, a defendant can invoke his privilege with respect to the testimony of any third party to whom his presumed confidant revealed his intended confidence without his authority. 8 J.H. Wigmore, Evidence in Trials at Common Law §§2325, 2339 (rev. ed. 1961). The privilege would be equally vitiated if a third party could testify as to evidence he derived indirectly from the confidential communication. With respect to privileged communications intercepted under Title III or FISA, both statutes provide, as noted above, that the intercepted communication does not lose its privileged character because of the interception. It should follow that the third party interceptor is in no better position to offer evidence derived from the privileged communication than he would have been had the confidant volunteered the information without the speaker's authorization.

Federal Rules of Evidence, Rule 501, provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a ... person ... shall be governed

7/ No constitutional rule applies to the "fruits" of privileged communications with spouses or clergymen that are constitutionally intercepted. No court has yet suggested that any First Amendment or constitutional privacy doctrine goes beyond the common law in protecting privileged communications.

by the principles of the common law as they may be interpreted by the United States in the light of reason and experience.

In view of the analysis discussed above, we think it a reasonable prediction that courts would interpret a suspect's privilege against a confidant's testimony "in the light of reason and experience" to encompass evidence derived indirectly from the interception of privileged communications that was authorized for other purposes. If the interception of privileged communications is attempted in order to protect a hostage, it may well be that the confidential information seized should be used for that purpose only.

IV. ETHICAL CONSIDERATIONS

In addition to problems of law, ethical questions arise concerning the interception of privileged communications with respect to both the participating Government lawyers and any confidant who consents to the interception of his conversation with the kidnap suspect. Department of Justice attorneys, for example, are subjected by regulation, 28 CFR §45.735-1(b) (1978), to the ABA Code of Professional Responsibility, which would ordinarily limit the ability of attorneys to participate in the covert surveillance of attorney-client communications.

We believe that, any such restrictions notwithstanding, Department of Justice lawyers may ethically participate in any lawful covert surveillance of privileged communications when human life and safety are at stake. The reference to the ABA Canon of Professional Ethics, now the Code of Professional Responsibility, in the Department regulations was not intended, in our view, to control entirely the permissibility of law enforcement techniques; undercover investigations routinely require the approval by the Attorney General and Department lawyers of activities of which the Canons would disapprove in other contexts. In the hypothesized case, the value of a hostage's life and safety is at least as weighty a value as the suspect's interest in the integrity of his marriage, the availability of legal advice, or the privacy of clerical counsel.

In cases of judicially authorized surveillance, attorneys may rely on the finding of the impartial magistrate that the

intended surveillance is for a proper purpose; a fortiori, in any case in which the immediate danger to life or safety would excuse warrantless surveillance, the exigent circumstances themselves would similarly render appropriate even the surveillance of privileged communications.

A trickier problem would be presented in a case in which a presumed confidant's request for surveillance, for purposes of his own protection, initiated investigators' contemplation of such a step. In such a case investigators must be acutely aware that the hostage's safe rescue is their prior ethical obligation. Cases may well exist in which surveillance and any attendant risk of discovery will not, on balance, improve the prospects for protecting a hostage. Reliance on a suspect's consent, whether requested or volunteered, must rest on the same judgment that precedes surveillance pursuant to judicial authorization, namely, that resort to surveillance will improve the prospects for recovering the hostage safely. In any case in which no such judgment can be made within a reasonable degree of risk, the investigators' cooperation in covert surveillance that is requested by the confidant would grossly violate the investigators' ethical obligation to the hostage.

This is not to say that Department attorneys have no ethical obligations with respect to the privileged communications of criminal suspects. The circumspect use of information gleaned through the electronic surveillance of privileged communications and efforts to assure that such interceptions do not contribute to a defendant's conviction will fulfill the Department's responsibilities to the integrity of confidential communications and the fair administration of justice.

Analytically more difficult problems are posed with respect to consenting confidants. First, although Department investigators may justly regard the value of protecting the hostage as paramount to any immediate interest the suspect has in the privacy of his confidential relationships, the status of the suspect's confidants entitles and perhaps compels them to reach independent judgments whether to cooperate with federal authorities. Care should be taken to permit legally recognized confidants to choose freely and intelligently whether or not to participate in covert surveillance.

With respect to attorneys, a lawyer's consent to cooperate in the electronic surveillance of his client, based on the conclusion of investigators that such cooperation is needed to protect a hostage, is an obvious exception to the ordinary rule that the lawyer's use of independent judgment in representing his client's interests is his central obligation. ABA Code of Professional Ethics, Canon 5. Under ordinary circumstances, a lawyer's prior consent to the covert interception of his conversations with his client would also violate Canon 4 of the Code with respect to preserving a client's confidences and secrets. 8/ However, given the manifest equities inherent in a hostage situation, it is nearly unthinkable that the bar would condemn an attorney's decision to rely on the reasonable judgments of government investigators, and to assist in electronic surveillance with the aim of saving human life. 9/

8/ Although Canon 4 permits the revelation of client confidences under specified circumstances, DR 4-101(c), the language of the rule is permissive and not mandatory. Canon 37 of the Canons of Professional Ethics, predecessor to Canon 4, more squarely covers the lawyer's obligations with respect to life-endangering situations, but is still permissive in form:

[A lawyer] may properly make such disclosures as may be necessary to prevent [an intended crime] or protect those against whom it is threatened.

The wording of Canon 37, now Canon 4, suggests a need for professional judgment by the lawyer as to the proper scope of disclosure, a need inconsistent with his prior consent to the monitoring of a privileged communication in toto. The ABA has declared, in both informal and formal opinions, that it is thus normally unethical for a lawyer to record, without disclosure and consent, any conversation between the lawyer and other parties. ABA Comm. on Professional Ethics, Formal Opinions, No. 337, 60 A.B.A.J. 1448 (1974); Informal Opinions, No. 1008 (1967).

9/ It may be that, given the equities involved, the bar would not deem a suspect's lawyer-client communications during a hostage situation privileged at all. The ABA's attempts to delimit the bounds of privilege during the commission of a crime have produced no clear result. See ABA Comm. on Professional Ethics, Formal Opinions, No. 155 (1936), No. 23 (1930).

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In sum, we conclude that no constitutional or statutory provision, or rule of ethics, bars absolutely the electronic surveillance of privileged communications in a hostage situation; that such surveillance may lawfully be conducted pursuant to a warrant or the confidant's consent, or, in truly exigent circumstances, without a warrant; and that a kidnap suspect's interest in the privacy of privileged discussions he conducts while he is holding a hostage can be appropriately protected by limitations on the use and disclosure of any intercepted information. The particular circumstances of each kidnapping case will lead investigators to different conclusions concerning which investigatory techniques are proper, safe, and lawful. The conclusion that the surveillance of privileged communications may, as a general matter, be conducted lawfully and ethically cannot obviate the need for such sensitive judgments in each individual case.

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9/ (Continued) It is sufficient for purposes of this opinion to assume that some privilege does attach to confidential communications during a hostage situation, and to consider how far that privilege extends in light of the paramount value of human life and safety.