

cc: Hall  
Hammond  
Harrison  
Files  
Huer  
Retrieval

United States Department of Justice  
Washington, D.C. 20530

28 MAR 1980

ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The Fourth Amendment and Intelligence Searches

The attached memorandum discusses two issues that we think might be raised by opponents of the Senate bill establishing a charter for the intelligence community. The first is whether the warrant provisions of the proposed National Intelligence Act of 1980 (NIA) are constitutionally adequate insofar as they authorize "extraordinary techniques," i.e., electronic surveillance and physical searches, directed at U.S. persons in foreign countries who are not believed to be engaged in any criminal conduct. The second question concerns the constitutionality of Title VIII of the proposed National Intelligence Act of 1980. That title establishes a warrant procedure for authorizing surreptitious entries onto the premises of U.S. persons without subsequent notice to the owner of the premises.

The memorandum concludes that these provisions are constitutional. But we do not want to understate the concerns of the bill's opponents and therefore we add a word here on the general contours of their arguments (or at least what we think their arguments will be). These arguments are not so much a tight extrapolation of existing case law as they are a particular vision of what constitutional law should be. Put differently, the arguments are better characterized as policy arguments than as legal arguments.

To many there is something deeply disturbing about the notion that government can invade their privacy in foreign countries even though they are guilty of no wrongdoing. Their offense grows when the intrusion is justified by a talismanic invocation of "national security" -- a phrase with a spotty history and an elastic definition. One's conception of "foreign intelligence" is also potentially boundless. There must be limits somewhere; the courts to date, however, have not articulated them or even clearly hinted their existence.

Opponents of the Senate bill will also have difficulties with the notion that one can be the subject of a Government search and never know -- never be able to test the governmental interest that was held to outweigh one's interest in privacy or even be aware that information about oneself or one's family is now shared with the Government.

In response to these deep-seated concerns and a vacuum in the case law, we anticipate novel due process and Fourth Amendment arguments relying on the privacy cases. To date the Supreme Court's privacy decisions have related to such matters as marriage, procreation, contraception, family relations, and child-rearing. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). But opponents of the CIA charter may well argue that these decisions reflect a more general right -- the right to be let alone -- a right which delimits governmental authority to invade the premises and persons of American citizens.

One can agree with the proposition without in any way denigrating the conclusions in the attached memorandum. For there has been no articulated distinction between privacy analysis in the search and seizure context and traditional Fourth Amendment analysis. The question is still one of reasonableness. Thus we think that opponents of the Senate bill are still left to argue that secret searches and searches against innocent targets are per se unreasonable -- a position difficult to square with the case law -- or that more procedural protections are necessary than those written into the Senate bill. We would expect the latter to be the more likely tack.

It is with respect to the latter tack that the Justice Department is dependent on the representations of the intelligence community. The certification and warrant procedures are tailored to that community's conception of the maximum degree of judicial oversight consistent with an effective intelligence operation. This memorandum cannot and does not look behind those representations. It accepts them as accurate. However, we think it important to emphasize that the warrant procedures include a dominant role for the Executive in the decision whether a search is necessary. That will undoubtedly concern civil liberty groups. All we think the Justice Department can do is assure the House and Senate that in fulfilling the Department's institutional role within the framework of the proposed NIA, the Department will scrupulously observe the limits imposed by the bill.

We anticipate that we will have an opportunity between today and the scheduled date of your testimony to review the submission on this question that the ACLU is now preparing. Our views here

will be supplemented in the event that the ACLU discussion of these issues sheds any new light on their constitutional theory.

John M. Harmon  
Assistant Attorney General  
Office of Legal Counsel

cc: Kenneth C. Bass III  
Eric Richard

cc:Hull ✓  
Retrieval  
Hammond  
Haar  
Harmon  
Files

28 MAR 1980

## MEMORANDUM TO THE ATTORNEY GENERAL

Re: The Fourth Amendment and Intelligence Searches

This memorandum addresses two questions regarding the Senate bill establishing a charter for the intelligence community (the proposed National Intelligence Act of 1980 (NIA)). The first is whether the warrant provisions of the NIA are constitutionally adequate insofar as they authorize "extraordinary techniques," i.e., electronic surveillance and physical searches, directed at U.S. persons in foreign countries who are not believed to be engaged in any criminal conduct. The second question concerns the constitutionality of Title VIII of the proposed NIA, which establishes a warrant procedure for authorizing surreptitious entries onto the premises of U.S. persons without subsequent notice to the owner of the premises. We conclude that these provisions are constitutional.

## I. Innocent Targets

Section 213 of the proposed NIA proscribes the use of covert techniques in foreign countries "directed against United States persons, except in the course of collection of counterintelligence or counterterrorism intelligence, or in extraordinary cases when authorized in accordance with" § 213. These "extraordinary cases" involve situations in which the President finds "that extraordinary circumstances require such collection to acquire foreign intelligence that is essential to the national security of the United States and that cannot reasonably be acquired by other means." § 213(b)(1). A Presidential designate may also authorize such activity in "unusual circumstances," but only if he additionally finds that "the target is a senior official of a foreign power, an unincorporated association substantially composed of United States citizens or permanent resident aliens directed or controlled by a foreign government or governments, or any other entity directed and controlled by a foreign power." § 213(c).

The Senate bill includes proposed amendments to the Foreign Intelligence Surveillance Act, codified in various sections of Title 18 and Title 50, that will limit use of "extraordinary techniques" inside the United States and directed at U.S. persons to situations in which there is probable cause to suspect a finding of criminal activity on the part of the U. S. person whose property or mail is to be searched. Searches directed against U. S. persons outside the United States are not so limited. However, even with respect

to these extraterritorial searches, to obtain a warrant of the following showing is necessary:

- (1) the Attorney General has certified in writing that the proposed use of an extraordinary technique against the United States person has been approved in accordance with section 213 of this Title to collect foreign intelligence;
- (2) the information sought is foreign intelligence;
- (3) there is probable cause to believe that the United States person against whom the extraordinary technique is to be directed is in possession of, or, in addition with respect to foreign electronic surveillance, is about to receive, the information sought;
- (4) less intrusive means cannot reasonably be expected to acquire intelligence of the nature, reliability and timeliness that is required; and
- (5) the proposed minimization procedures meet the definition of minimization procedures under section 202(b)(10) of this title.

NIA § 221(c).

It is our opinion that the Fourth Amendment does apply to actions of American officials directed at American nationals abroad. Reid v. Covert, 354 U.S. 1 (1957); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976). The pertinent question here is whether the Fourth Amendment proscribes a search directed at a U.S. citizen who is not suspected of criminal wrongdoing.

The Fourth Amendment 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.

Reasonableness is the sine qua non of a constitutional search. As the Supreme Court has noted innumerable times, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted). Although foreign intelligence collection may be within an exception, 1/ a warrant is nevertheless required by the proposed NIA. Assuming, arguendo, that the Fourth Amendment also requires a warrant to collect foreign intelligence, the constitutionality of the NIA's warrant procedures depends on whether warrants contemplated by the Act will be supported by "probable cause" within the meaning of the Fourth Amendment. Specifically, must the possessor of the foreign intelligence information be suspected of wrongdoing before there is probable cause under the Constitution to conduct a search?

The Supreme Court has recently re-emphasized that "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978). In the criminal context, the things to be searched for and seized are usually "fruits, instrumentalities, or evidence of a crime." Id. at 554. But the Supreme Court has stated that a reasonable search under the Fourth Amendment need not be limited to a search for evidence relating to criminal activity.

The seminal case on this point is Camara v. Municipal Court, 387 U.S. 523 (1967). At issue in Camara was the constitutionality of an ordinance which permitted inspectors to make warrantless inspections of residences to insure compliance with housing codes. An argument was made in that case analogous to the argument that might be made by opponents of the extraterritorial warrant standards found in the NIA. The appellant in Camara contended that a warrant to inspect a residence for housing ordinance violations does not meet the standards of the Fourth Amendment unless there is "cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced." Id. at 534.

1/ See United States v. United States District Court, 407 U.S. 297 (1972). Compare Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (plurality opinion), cert. denied, 425 U.S. 944 (1976), with United States v. Buck, 548 F.2d 871 (9th Cir.), cert. denied, 434 U.S. 890 (1977); and United States v. Butenko, 494 F.2d 593 (3d Cir.), cert. denied, 419 U.S. 881 (1974).

The Court rejected this argument. It quoted with approval Justice Douglas's observation in his dissent in Frank v. Maryland, 359 U.S. 360, 383 (1959): "The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." In Camara the Court held that the touchstone for probable cause is whether the search is reasonable, and that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Id. at 536-36; see United States v. United States District Court, 407 U.S. 297, 314-15 (1972).

The need for authority to conduct searches directed at U. S. persons overseas, even when there is not cause to believe they are guilty of wrongdoing, is evident from the statutory perimeter of that authority set out in the proposed NIA. The President must find "extraordinary circumstances require such collection to acquire foreign intelligence that is essential to the national security of the United States and that cannot reasonably be acquired by any other means." NIA § 213 (b)(1) (emphasis added). The court must also satisfy itself that less intrusive means of obtaining the information "cannot reasonably be expected" to succeed. NIA § 221(c)(4).

We think need outweighs "the invasion which the search entails." Indeed, searches contemplated by the NIA are in certain respects more limited and particularized than the administrative searches at issue in Camara and See v. City of Seattle, 387 U.S. 541 (1967). For the searches here involve extraterritorial operation, specifically defined intelligence information, and probable cause to believe that the information sought is at the place to be searched. These searches must be authorized at the highest levels of Government and upon the most stringent representations as to the necessity for them. The administrative search warrants envisioned by Camara and See involve domestic searches and statutes of broad application, and are not based on probable cause to believe that the residences or businesses to be inspected are actually in violation of local codes or ordinances. Moreover, the Supreme Court has observed that "a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor." Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

2/ Similar exigent circumstances delimit the authority of a Presidential delegate to certify the need for a search. As noted above, he must find "that unusual circumstances require such collection to acquire foreign intelligence that is important to the national security of the United States and that cannot reasonably be acquired by other means." NIA § 213(c)(1). He must also find that the target is controlled by a foreign power.

In United States v. United States District Court, 407 U.S. 297 (1972), the Supreme Court recognized that intelligence gathering is different in kind from criminal investigation and that Fourth Amendment standards for warrants in criminal investigations are not necessarily constitutional requisites in the intelligence area.

Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.... It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of [Title III of the Omnibus Crime Control and Safe Streets Act of 1968] but should allege other circumstances more appropriate to domestic security cases....

Id. at 322-23. Even those members of the United States Court of Appeals for the District of Columbia Circuit, who have articulated the most expansive view of Fourth Amendment strictures on intelligence collection, have also observed:

[I]t would appear to be proper to issue warrants where there is "probable cause" to believe that certain categories of intelligence information are likely to be obtained from the surveillance, even though evidence of crime is neither sought nor likely to be uncovered.

Zweibon v. Mitchell, 516 F.2d 594, 636 (D.C. Cir. 1975) (plurality opinion); see also id. at 669-70.

The purpose of the probable cause requirement is the same as that of the Fourth Amendment generally "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Camara, supra, at 528. The warrant procedure contemplated by NIA §§ 213, 221 is designed to insure against arbitrary searches. It guarantees that "the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field." See, supra, at 545; see Brown v. Texas, 99 S. Ct. 2637 (1979). The searches are to be based on demonstrated need and limited to specific objectives. We



conclude that the NIA's warrant procedure satisfies Fourth Amendment requirements.

II. Lack of Subsequent Notice that a Foreign Intelligence Search Has Been Conducted

Title VIII of the proposed NIA authorizes surreptitious entries onto the premises of U.S. persons without subsequent notice to the owner of the premises. We conclude that the Fourth Amendment does not require notice in situations where it is not required by the NIA.

Searches in this country, conducted by federal authorities are generally subject to Rule 41 of the Federal Rules of Criminal Procedure. Rule 41(d) provides in pertinent part:

The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.

Under Rule 41 the individual whose premises are the subject of the search is notified that a search in fact has taken place.

There is no question that searches conducted under the proposed NIA would be outside the terms of Rule 41. Subsection (f) of Rule 41 states that the Rule "does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made." Yet it could be argued that the type of notice provided for by Rule 41 is required by the Fourth Amendment.

Courts have on occasion confronted failures to comply with Rule 41(d), and they have not held that its provisions are of constitutional dimension. As the Sixth Circuit noted in United States v. McKenzie, 446 F.2d 949, 954 (1971):

Although important, the procedures required for execution and return of a search warrant, contained in Rule 41(d) of the Federal Rules of Criminal Procedure, are ministerial. Absent a showing of prejudice, irregularities in these procedures do not void an otherwise valid search.

See, e.g., United States v. Gross, 137 F. Supp. 244 (S.D.N.Y. 1956) (Weinfeld, J.); see also United States v. Harrigan, 557 F.2d 879, 883 (1st Cir. 1977) (involving notice pursuant to 18 U.S.C. § 2518(8)(d)).

The Supreme Court has never held that notice is invariably demanded by the Fourth Amendment; indeed, it has never clearly articulated any circumstances when notice was constitutionally required. Some lower courts, however, have indicated in dictum that notice may be mandated by the Fourth Amendment. United States v. Bernstein, 509 F.2d 996, 1000-01 (4th Cir. 1975), vacated for further consideration of other grounds, 430 U.S. 902, reversed on other grounds, 556 F.2d 244 (4th Cir. 1977); United States v. Eastman, 465 F.2d 1057, 1063-64 (3d Cir. 1972). In so doing they have relied on Berger v. New York, 388 U.S. 41 (1967). We think that what Berger and subsequent cases such as Katz v. United States, 389 U.S. 347 (1967), demonstrate is that the necessity for notice, like that for other steps in the search and seizure procedure, has been judged by a flexible "reasonableness" test which looks to whether notice will frustrate the purposes for which the search is conducted. 3/

In Berger v. New York, *supra*, the Court struck down New York's eavesdrop statute on the grounds that it was too lax procedurally to protect adequately Fourth Amendment values. The decision did not rest in the main on a determination that a certain set of procedures is constitutionally required--indeed the Court stressed that the Fourth Amendment's standards of reasonableness "'are not susceptible of Procrustean application.'" *Id.* at 53 (quoting Ker v. California, 374 U.S. 23, 33 (1963)). Rather Berger rested on a finding that the procedural mix of the eavesdrop statute did not afford the "precise and discriminate" procedural requirements necessary to insure against "indiscriminate use" of the eavesdrop authority. *Id.* at 58. In citing the statute's general defects, the Court made the following observation with respect to notice:

3/ The analysis is analogous to that which the Supreme Court applies when determining whether a particular kind of search should be subject to a warrant requirement. "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

Finally, the statute's procedure necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized.

Id. at 60. The necessary implication of this quotation is that where there are "special facts" or "exigent circumstances" notice may be avoided consistent with the Fourth Amendment.

In Katz v. United States, 389 U.S. 347 (1967), the Court discussed its failure to require advance notice of electronic surveillance in Osborn v. United States, 385 U.S. 323 (1966).

In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in Osborn simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.

389 U.S. at 355 n.16. See also Ker v. California, 374 U.S. 23, 37-41 (1963). The Court reiterated this approach only last term. Dalia v. United States, 441 U.S. 238, 247-48 (1979).

We have consistently in the past opined that "[t]he pertinent case law indicates that notice is not an absolute constitutional requirement, and that on occasion other considerations might justify a result in which no notice is given." <sup>4/</sup> We do not suggest that the Fourth Amendment may not indeed require notice, at least after the search, where

---

<sup>4/</sup> OLC Memorandum to Anthony Lapham, CIA General Counsel, dated July 17, 1978, at 7.

such notice does not frustrate the purposes of the search. 5/  
But that is not the case the proposed NIA addresses.

Those knowledgeable in this area assert that notice, before or after the search, would destroy the effectiveness of searches for foreign intelligence or counterintelligence information. The purposes of such searches are quite distinct from those underlying searches in support of criminal law enforcement. 6/ After a search conducted in the course of a criminal investigation yields evidence of a crime, its goal is accomplished and notice may have the additional benefit of

---

5/ Compare United States v. Cafero, 473 F.2d 489, 499, 500 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974):

We find it difficult to accept the proposition that a search may be deemed reasonable, and therefore constitutional during the various stages of application for authorization, execution, supervision of the interception, and termination, only to be invalidated ab initio because of the operation of some condition subsequent, to-wit, a failure to give notice of the items seized....

It would appear that in the literal context of the Fourth Amendment, post-search notice of an electronic interception may properly relate only to the issue of "reasonableness" in the conduct of "searches and seizures."

6/ The NIA provides for notice where a criminal prosecution is contemplated. The procedures for physical searches are the same as those for surveillance under the Foreign Intelligence Surveillance Act. Section 106(c) of FISA provides:

(c) Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this title, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

detering future criminal conduct. When a search is directed at an agent of a foreign power to obtain intelligence or counterintelligence information, the principal purpose is not the enforcement of the criminal law but collection of the information itself and identification of channels for that information. Notice would give the foreign power a formal acknowledgement that it or its agents are the subject of American intelligence efforts, undoubtedly complicating its relationship to the United States. But more importantly, it might also signal what channels of information the United States has identified and tapped, and the manner in which it has done so, thus encouraging the foreign power to close those channels and open new ones not known to the United States and to adopt counterintelligence methods that will frustrate similar information collection efforts by the United States. Notice of our foreign intelligence collection efforts would also discourage if not destroy allied cooperation with our intelligence agencies. In short, intelligence gathering does not operate within the discrete context and time frame of a criminal investigation.

The need for secrecy about intelligence gathering operations was recognized by the Congress during its consideration of the Foreign Intelligence Surveillance Act of 1978. Thus the Congress considered and rejected any mandatory notice to surveillance targets. It chose to rely instead on other safeguards "more stringent than conventional criminal procedures" to compensate for the lack of notice, such as greater Congressional involvement in intelligence activities. See S. Rep. No. 95-701, 95th Cong., 2d Sess. 11-12, 65-66 (1978).

The Supreme Court acknowledged the fundamental differences between intelligence gathering and criminal investigations in United States v. United States District Court, 407 U.S. 297, 322 (1972), and noted that these differences warrant different procedural safeguards.

[W]e do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful

activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Of course, simply because notice would frustrate a particular class of searches does not mean it should be dispensed with. Secret searches are a most serious intrusion upon the privacy of individuals and can only be condoned under the Fourth Amendment's reasonableness test when they are absolutely necessary to serve our most critical national interests. We think the extraordinary certification and warrant procedures of the Foreign Intelligence Surveillance Act of 1978 and the proposed National Intelligence Act of 1980 are designed to ensure that secret searches are only conducted under such circumstances. We conclude the warrant procedures are therefore constitutional despite the lack of a provision for mandatory notice.

John M. Harmon  
Assistant Attorney General  
Office of Legal Counsel