

Department of Justice  
Washington, D.C. 20530

6 MAY 1980

MEMORANDUM FOR ALICE DANIEL  
Assistant Attorney General  
Civil Division

Re: Civil Use of Privileged Information  
Collected for Foreign Intelligence  
Purposes

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You have requested our views on a thorny legal and ethical problem that has arisen in connection with civil litigation involving a foreign government. The United States is not a party to this litigation, but the litigation has a direct bearing on important foreign policy issues. The Government is watching the litigation closely. We have participated or may participate in the litigation as amicus or possibly as an intervenor. We maintain direct contact with the private individuals and firms that are participating in the litigation as parties.

The problem arises because the Government, under a program of surveillance conducted for the purpose of gathering information for use in the conduct of foreign affairs, intercepts communications that pertain to this litigation. Some of these communications are "privileged." They are communications between officers or agents of the foreign government and attorneys representing the foreign government in the litigation. Given the normal legal and ethical proscriptions against interference with the attorney-client relationship and the exploitation by attorneys of privileged information obtained deliberately from an adversary's camp, you have asked whether in our view the collection and use by the Government of the privileged information in question here presents any substantial legal or ethical question.

This is a difficult subject. The analysis is complex. We shall take it step by step:

(1) There are circumstances in which "privileged" information derived from the communications of a foreign government may be lawfully acquired by our Government for use in the development and execution of foreign policy. We are assuming

for purposes of this discussion that the information in question in the present case is being acquired by our Government under a lawful program of surveillance and is being disseminated and used internally for lawful foreign policy purposes.

(2) It is apparent, in our view, that the process of acquiring information (even "privileged" information) from the communications of a foreign government and using that information in the development of foreign policy need not come to a halt simply because the foreign government becomes involved in civil litigation with U.S. persons. If the process is lawful in the first instance, it may go forward. The "privileged" character of the information creates no special legal or ethical questions in itself. Questions arise only if the Government attempts to exploit the information in a way that will affect the conduct or outcome of the pending litigation. \*/

(3) If the information in question in the present case is derived from electronic surveillance conducted under the authority of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, any attempt to use it "in" the litigation may trigger a mandatory disclosure procedure set forth in the Act. The Act provides:

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

\*/ Even in a routine criminal case, in which the Government itself is a party and the privileges of the defendant are given specific constitutional protection under the Sixth Amendment, the mere possession and use by the Government of attorney-client communications lawfully acquired during the pendency of the case does not create any substantial question as regards the rights and privileges of the defendant, absent some actual use of the information that affects the conduct or outcome of the case. Weatherford v. Bursey, 429 U.S. 545 (1977); see Hoffa v. United States, 385 U.S. 293 (1966).

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. 50 U.S.C. 1806(c) (emphasis supplied).

The Act defines the terms "aggrieved person" and "person" so broadly that this procedure could operate in favor of a foreign government. A foreign government is a "person," and potentially an "aggrieved person," within the meaning of the Act. The Act requires our Government to notify any "aggrieved person" whenever it intends "to enter into evidence or otherwise use" against that person in a judicial proceeding any information obtained from electronic surveillance of that person under the Act. \*/

(4) Congress was well aware that questions of "privilege" might be presented by an attempt to use otherwise privileged information lawfully acquired under the Act in court or in other forums in which considerations of "privilege" are important under our law, and Congress made provision against that possibility. Taking language from the wiretapping provisions of the Omnibus Crime Control Act of 1968, see 18 U.S.C. § 2517(4), Congress expressly provided in the Act that "no otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this title shall lose its privileged character." \*\*/

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\*/ Whether any given "use" of information acquired under the Act is of such form and character as to qualify as a "use" of the information "in" a judicial proceeding for purposes of the disclosure procedure is a question that must be addressed, it seems to us, on a case-by-case basis in light of all the relevant facts and circumstances. We note in passing that the disjunctive construction of the relevant language -- "to enter into evidence or otherwise use or disclose" -- suggests that information might be used "in" a proceeding for purposes of the disclosure provision even though the use would not be evidentiary in nature and would involve no actual disclosure in the proceeding.

\*\*/ (Footnote on p. 4)

(5) The net legal effect of this undertaking to preserve the "privileged character" of privileged information lawfully acquired under the Act has not been the subject of any reported judicial decision, to our knowledge. \*/ It is difficult to see, however, how the effect could be anything other than the following: If the Government obtains otherwise privileged information under authority of the Act and wants to "use" it "in" a civil proceeding "against" an "aggrieved person" from whom the information was obtained, the Government must give notice to the aggrieved person and to the court.

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\*/ (Footnote from p. 3)

50 U.S.C. § 1806(a). This language appears in the following context:

(a) Information acquired from an electronic surveillance conducted pursuant to this title concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this title. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this title shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this title may be used or disclosed by Federal officers or employees except for lawful purposes.

We are aware of the argument that this reservation in favor of privileged information might be read to preserve the privilege only with respect to "U.S. persons," not foreign governments. The first sentence of the subsection refers to U.S. persons only. That is not an unreasonable interpretation of the text, but we find no direct support for it in the legislative history. Moreover, when the privilege provision is read in connection with the disclosure provision (which operates in favor of any aggrieved person, not just U.S. persons), it is not easy to see why Congress would have intended to limit the one while permitting the other to operate in favor of all.

\*/ A similar attempt to preserve the privileged character of otherwise privileged information gathered for intelligence purposes is made in the proposed National Intelligence Act.

Inasmuch as the statute seems to require that the "privileged character" of the information be recognized notwithstanding its acquisition by the Government, the court would then be obliged, under the statute, to honor a motion by the aggrieved party for protection from the "use" of the information by the Government "in" the proceeding. The "privileged character" of the information could not otherwise be preserved in any meaningful sense. It seems to us that at the very least a protective order entered by the court on motion of the aggrieved party could properly forbid the Government to introduce the information or its fruits into evidence in the proceeding over objection. Moreover, it seems to us that the aggrieved party could make a cogent argument that the order could properly provide other kinds of relief as well. Consider, for example, the problem of preserving the privileged character of "work product information" or information relating to litigation strategies. In ordinary civil litigation the law of privilege prevents the acquisition and use of that sort of information by adverse parties, even though the best (and perhaps the only) use that can be made of it by an opponent is "nonevidentiary" in nature. If the Government used the Act to acquire information about the litigation strategy of a party in a civil case, one could argue with force that to preserve the "privileged character" of the information a protective order would have to do more than prevent the introduction of the information into evidence. The "privileged character" of the information could be preserved, as the statute contemplates, only if the order prevented the Government from using the information or exploiting it in nonevidentiary ways.

(6) This interpretation of the Act tracks the practical interpretation that has been given by this Department to the identical language in Title III, upon which the Act was modeled. Under Title III, this Department simply does not use, nor does it attempt to acquire, privileged information. Even though the method of collection might be perfectly lawful for Fourth Amendment purposes, we have assumed that the express statutory reservation protecting the "privileged character" of otherwise privileged information obtained by wiretap would prevent the information or its fruits from being used or exploited in any criminal prosecution against the aggrieved party; and thus its acquisition by the Government could do nothing but jeopardize a prosecution brought against that party on the basis of other evidence.

(7) The preceding discussion applies only to information acquired under the authority of FISA. We are advised that much of the information in question in the present case is not acquired under FISA. To determine whether its use by the Government in connection with this civil litigation would violate rights and privileges, if any, belonging to the foreign government as a litigant, we must have recourse, not to FISA, but to

general legal and ethical principles governing the acquisition and use of privileged information by the Government. We should note at the outset that our research to date has revealed no definitive judicial decision dealing with the question whether, apart from FISA or any other specific statute, our Government may (a) employ otherwise lawful surveillance techniques to intercept communications between a foreign government and its attorneys and (b) use the resulting information for the purpose of influencing civil litigation in which the foreign government is involved. The subsequent analysis is therefore based on conjecture. We shall begin with a discussion of the relevant constitutional principles, and we shall then proceed to a discussion of nonconstitutional principles, both legal and ethical, that govern the acquisition and use of privileged information in ordinary cases.

(8) As a constitutional matter, if we were dealing in this case with criminal litigation, not civil litigation, and if the foreign party were an individual, not a government, we could cite numerous decisions standing for the proposition that our Government cannot claim a right to intercept communications between the defendant and his attorney and use them for the purposes of preparing and conducting the prosecution. Quite apart from the common law of "privilege" or the constraints imposed by the Fourth Amendment on the acquisition of personal information by the Government through unreasonable means, the "right to counsel" guaranteed by the Sixth Amendment prevents the Government from conducting a criminal case on the basis of confidential information obtained from communications between the defendant and his attorney. In other words, in this context, the "right to counsel" is not simply the right to have counsel. It is the right to enjoy the privilege of confidentiality that is a traditional part of the relation between attorney and client. See Weatherford v. Bursey, *supra*; Black v. United States, 385 U.S. 26 (1966); O'Brien v. United States, 386 U.S. 345 (1967).

(9) What is the rule on the civil side? There is general authority in the lower courts to the effect that a "right to counsel" is a element of the process reasonably due a civil litigant under the Fifth Amendment. We are prepared to assume that the Government could not constitutionally prevent a person from employing and using qualified counsel in civil litigation in which the Government has an interest (assuming the person's liberty or property was otherwise at stake in the litigation); and on that basis one could make a reasonable and persuasive argument that if the deliberate interception and use by our Government of attorney-client communications to advance governmental interests in a criminal case deprives a criminal defendant of his right to counsel under the Sixth Amendment, the same sort of conduct by the Government would deprive a civil litigant of due process of law under the Fifth.

(10) As a constitutional matter, the fact that the adverse party in the present litigation is a government, not an individual, is of more significance than the fact that the litigation is civil, not criminal, in nature. We have opined in the past that the purpose of the Bill of Rights and of the Fifth Amendment in particular is not to protect foreign governments from the Government of the United States. As the language of the constitutional text suggests, the purpose of these great guarantees is to regulate the relations between our Government and the persons who are subject to the legislative, administrative, and judicial jurisdiction of our Government. In accordance with that principle we have opined, for example, that the Fourth Amendment and the just compensation clause of the Fifth Amendment do not protect foreign governments, even though they may protect foreign persons who are subject to our law. We have expressed doubt, however, that the same principle would utterly strip the foreign governments of due process rights if they submit or are required to submit to the legal process of our courts. In other words, we have recognized the possibility that a foreign sovereign may acquire at least some of the rights that a foreign individual would enjoy who is subjected to judicial process in our courts. Having relinquished or having been required to relinquish a measure of the unqualified immunity it would otherwise enjoy, the foreign sovereign, as a litigant subject to the jurisdiction of our courts, may become a "person" with privileges in the litigation analogous to those enjoyed by other persons subject to our law.

(11) This brings us to the last stage in our analysis. If we could assume for the sake of argument that neither FISA nor the Constitution would prevent the Government from exploiting in court privileged information obtained from the attorney-client communications of a foreign government pertaining to pending litigation involving the foreign government, we would yet be bound to inquire whether there is any additional legal or ethical principle that would preclude such use. Let us be sure that our hypothesis is clear. For purposes of analysis we shall assume (1) that our law authorizes in a proper case the acquisition of the attorney-client communications of a foreign government, (2) that in such a case there may be no specific statute (e.g., FISA) preserving the "privileged character" of that information in the hands of our Government, and (3) that the use by our Government of that information in a civil case involving the foreign government would not be inconsistent with the due process clause. Would there be, in those circumstances, any other legal or ethical principle that would prevent our Government from using that information in that way?

As we have said, we have found no case on point. Insofar as the common law of "privilege" is concerned, it is doubtful that

a mere claim of privilege founded in the common law would prevent the Government from using attorney-client information against a foreign government in civil litigation (assuming our Government had acquired the information lawfully in the first instance). At common law, the otherwise lawful acquisition and use of attorney-client information by the Government, even through eavesdropping or other devious techniques, could not be challenged on grounds of privilege. The mere policy of promoting the intimacy of the attorney-client relationship did not create a legal barrier to the otherwise lawful acquisition and use of attorney-client information by the Government. This is a point not much discussed in the modern cases. Commentators have criticized the traditional rule, see Weinstein's Evidence (2 United States Rules) ¶ 503(b)[02], but a recent attempt to alter the rule in the new Federal Rules of Evidence was unsuccessful. We assume that it is still the law. Indeed, the very reason that Congress inserted the savings clause into Title III and FISA permitting the preservation of the "privileged character" of otherwise privileged information obtained under the legislation was that Congress did not want these new eavesdropping techniques to erode privileges vulnerable to such techniques under the common law rule.

If the law of privilege alone would not prevent the use of lawfully acquired attorney-client communications against a foreign government in a civil case, and if such use would not violate a statute or so interfere with the right to counsel or the conduct of the litigation as to violate due process, the only remaining question is whether there is some free-floating principle of fairness or ethics, independent of the constitutional principle of due process, that would prevent attorneys for the Government from using attorney-client information against a foreign government in this way. \*/ In our opinion, there is

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\*/ This question is an important one largely because the due process rights of a foreign government in litigation are not entirely clear. In an ordinary civil case, if the Government undertook during the pendency of the case to intercept and use otherwise privileged information against the adverse party, that action would raise such a substantial question regarding invasion of the attorney-client relationship by the Government that in our view it would be unnecessary to consider mere ethical or equitable principles in order to counsel against it.

none. It seems to us that in determining how to deal with a foreign government in court, law ought to be decisive. If the information is lawfully acquired for other lawful governmental purposes, if there is no statute that prevents its use in a civil case, if the use is consistent with due process, if the privileged character of the information has been lost for evidentiary purposes under the common law, we know of no reason why it would be unethical or unfair for a government attorney to use the information against the foreign government in civil litigation to advance the interests of our Government in the litigation. We say this with full recognition that it would be an ethical breach of the grossest sort for a private attorney in a private case to eavesdrop on his adversary for the purpose of obtaining privileged information for use in a civil proceeding. Cf. ABA Formal Opinion No. 47.

(12) We have one final observation. Everything we have said so far assumes that the information in question here is "privileged" at the time of its acquisition. We must remember, however, that even in cases that are far less exotic than this one, not every attorney-client communication is "privileged." For example, communications concerning steps to be taken by an attorney or a client in the commission of a mundane domestic offense are not entitled to protection under our law. They are not "privileged." The public interest in disclosure, where crime may be prevented, outweighs the general interest in guaranteeing clients confidential access to attorneys.

Although we are breaking new ground here, we think that a similar principle may be applicable in the field of foreign affairs. Communications between a foreign government and its attorney concerning, say, litigation strategies, evidentiary questions, or legal theories to be pursued in pending civil litigation in which the foreign government is involved are surely "privileged" in the traditional sense. But it may be that communications concerning, say, future action to be taken by the foreign government in the international arena adverse to the interests of the United States are not privileged, for the same reason that communications concerning the future commission of domestic crimes are not privileged. It is simply a question of the public interest in disclosure. If the public interest in disclosing Joe Smith's plan to commit petty larceny in Topeka (confided in confidence to his legal aid attorney) is so great that disclosure is permissible, notwithstanding the usual rules about privilege, it would be laughable to think that the law of privilege cannot permit disclosure of a major plan by a foreign government to take significant future action in the international field adverse to the interests of the United States.

(13) Our advice is the following: If the potential foreign policy value of the attorney-client communications now being acquired under the program of surveillance is significant, then the information should be submitted to policymakers in the Government for use in the development of foreign policy. We should recognize, however, that the dissemination of the information may create problems for the Government if the Government wishes to involve itself directly in the pending civil litigation. We think the principal risks are the following: (a) that a court order issued to protect the "privileged character" of privileged information acquired (and required to be disclosed) under FISA may prevent the Government from taking some action in the litigation it would otherwise be able to take, were its position not "tainted" by the acquisition of the information in the first instance, and (b) that a court may determine upon discovery, with respect to information not acquired under FISA, that its acquisition and use by the Government to affect the outcome of the litigation deprived the foreign government of process to which it was entitled as a litigant in our courts. Given the present uncertainty of our posture regarding the civil litigation, it seems to us that the best we can do is to advise that steps be taken internally to reduce these risks.

Our recommendation is based upon two principles. First, our Government is ordinarily quite capable of protecting the legitimate interests of the American people in civil litigation without opening pipelines into an adversary's camp and drawing off information about litigation strategy. The civil process is hedged about with safeguards designed to ensure that any participant (even the Government) will have an opportunity to protect its interests if it is disposed to do so; and we routinely rely upon these procedures (and these alone) in civil cases whose significance for the common good is comparable to that of the litigation involved here. Accordingly, it seems to us that in determining whether any given piece of attorney-client information collected under this program of surveillance should be disseminated to policymakers in the Government for any purpose, the collecting agency ought first determine whether the information has any significance for Government other than its tendency to show what legal theories, evidentiary questions, litigation tactics, and the like are under consideration by the other side. If the information has no significance other than that, its "privileged" character will be rather clear, its dissemination will simply exacerbate the risks to which we have referred, and the resulting benefit will be one that the Government probably does not need anyway.

On the other hand, if the collecting agency determines that the information is significant for reasons other than its tendency to show what the other side may or may not do in this

civil litigation, the case for dissemination is relatively strong. Because of its broader significance in the conduct of foreign policy, we may be able to argue (if the question ever arises) that the information is not privileged anyway (see paragraph 12) or that in any case its necessary dissemination within the Government should not prevent the Government from doing what it would otherwise have been entitled to do in the litigation. Failing that, the foreign policy benefit of dissemination may counterbalance any legal difficulty encountered if we want to take action, direct or indirect, to influence the outcome of the litigation.

Our recommendation is that the present dissemination procedures be modified to reflect this calculus, and that the review procedure currently employed pursuant to the internal rules of the collecting agency be incorporated in procedures approved by the Attorney General under Executive Order 12036.

Larry A. Hammond  
Deputy Assistant Attorney General  
Office of Legal Counsel