03 Re Marianas writings

February 2, 1977

Memorandum for Messrs. Stoddard and Willens

From: Nancy Garrison

Re: Marianas -- Rights of and Remedies Available to American Consultants Allegedly Subjected to Surveillance

Questions:

1. How can American citizens who acted as legal counsel and economic consultants to the Marianas Political Status Commission --

a. Determine whether any of their conversations with their clients while they were in the Marianas were the subject of electronic or other surveillance by agencies of the United States government as has been suggested in recent news reports?

b. Determine the substance of conversations overheard or recorded?

2. If such conversations were intercepted or recorded --

a. Has there been a violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) or the Fourth Amendment?

b. What remedies are available and what defenses could be raised in a suit based on 18 U.S.C. § 2520 or on an implied constitutional right to damages?

Background

During the period September 1, 1972 through March 1, 1975, lawyers and economists who are (and were at the time) United States citizens served as advisors to the Marianas Political Status Commission in its negotiations with the United States government. The members of the Political Status Commission represented the Marianas district legislature, the Marianas delegation to the Congress of Micronesia, municipal councils, the business community and the two political parties; they were not subject to United States government control. Tne negotiations resulted in the Covenant, approved by Congress on March 24, 1976, P.L. 94-241, 94th Cong., providing for the Marianas' transition from trust territory to commonwealth status.

Since 1947, the Marianas have been a part of the Trust Territory of the Pacific Islands. The United States has been the administering authority under a United Nations Trusteeship Agreement (T.I.A.S. No. 1665). Article 3 of the Trusteeship Agreement provides:

> "The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements."

Executive orders and Department of the Interior orders issued under 48 U.S.C. § 1681 established the Government of

Micronesia under the High Commissioner (who is appointed by the President of the United States with the advice and consent of the Senate, 48 U.S.C. § 1681a). Thus, while the Marianas' status is different from that of United States "territories," the United States exercises a significant degree of control, particularly in the area of foreign relations.

I. Possible Methods of Seeking Desired Information

There are two major statutes which provide individuals with rights of access to government records: the Freedom of Information Act (5 U.S.C. § 552) which provides for public disclosure of government records, with specific exceptions, and the Privacy Act (5 U.S.C. § 552a) which allows an individual to determine what information the government has about him and provides some limited procedures for insuring the accuracy and controlling the dissemination of information which government agencies collect about individuals.

A. Freedom of Information Act requests

1. General procedure

Under the Freedom of Information Act each agency[1/] is required to make records "promptly available" to any

1/ 5 U.S.C. § 552(e) provides:

> "For purposes of this section, the term 'agency' as defined in § 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President) or any independent regulatory agency."

person who, in accordance with the agency's published rules, makes a request which "reasonably describes" the records sought,[2/] unless the requested records fall within one of nine statutory exemptions.[3/]

2/ A description will be sufficient if it enables a professional employee of the agency who is familiar with the subject area of the request to locate the record with a reasonable amount of effort. H.R. Rep. 93-876, 93d Cong., 2d Sess. (1974). (The House language for this section was adopted in the conference bill.)

3/ The statutory exemptions are as follows:

"(b) This section does not apply to matters that are -

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute; [This exemption was further amended by P.L. 94-409, which will be effective March 30, 1977.]

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial

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Freedom of Information Act requests are made to the office in each government agency designated in that agency's regulations to receive and process such requests (5 U.S.C. § 552(a)(3)).[4/] An agency has ten days after receipt of a request in which to notify the person making the request of the agency's determination as to whether the records will be released and the reasons for that determination; an adverse determination (or failure to respond) may be appealed to the agency head who must respond within twenty days after the receipt of the appeal (5 U.S.C. § 552(a)(6)(A)). These time limits may be extended in unusual circumstances (5 U.S.C. § 552(a)(6)(B)). After a response in which an agency indicates that it will produce

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> or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
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> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
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> (9) geological and geophysical information and data, including maps, concerning wells."

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4/ A list of these addresses, as published in the Federal Register, is reprinted in C. Marwick, ed., Litigation Under the Amended Federal Freedom of Information Act, Appendix, p. 22 (2d Ed. 1976).

records there is no set time limit for production, but the records must be made available "promptly" (5 U.S.C. § 552(a)(6)(C)). The agency may charge a standard fee, limited to "direct costs of search and duplication" (5 U.S.C. § 552(a)(4)(A)). If records are improperly withheld, a district court has jurisdiction to order production. In such an action the court is to determine de novo whether the requested information falls within one of the exemptions provided in the Act and may examine the contents of agency records in camera in order to make its determination. The burden is on the agency to sustain its action (5 U.S.C. § 552(a)(4)(B)).

2. Agencies to which a request might be made

Freedom of Information Act requests for information as to what, if any, surveillance of the Political Status Commission consultants took place should probably be directed to the following agencies, all of which had, or may have had, some involvement in the Marianas negotiations: State Department, Department of the Interior, Office of Micronesian Status Negotiations, Department of Defense, Central Intelligence Agency, National Security Agency, National Security Council, Department of Justice (Office of Legal Counsel).[5/]

3. Form of request

A broadly framed request would minimize the possibility of an agency's interpreting it so as to

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5/ These suggestions are based on Helfer's recollection as to the agencies involved.

exclude relevant materials, yet the request must also meet the statutory criterion of "reasonably describing" the records sought. A request similar to the following might be appropriate:

> "All documents, electronic recordings, and other records of any kind which refer or relate to any oral or written communications to or by, or to any activities of [insert names of individuals], related in any way to negotiations between the Marianas Political Status Commission, to which these individuals served as legal and economic consultants, and the United States government, during the period September 1, 1972 to March 1, 1975. This request includes, but is not limited to electronic recordings of oral communications to or by such person; logs, summaries or reports based on such recordings; and reports on any other type of surveillance of such persons." 6/

Under the Freedom of Information Act (in contrast to the Privacy Act, which gives an individual access only to government records about himself), the government's obligation to disclose does not depend on who makes the request or why the information is requested. 7/ Thus, the same information available to a person who was the object of

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6/ If a primary objective is to determine whether there in fact was any electronic surveillance, it might be useful to break the request down into a narrow request for records indicating whether or not any such surveillance of named persons took place and a broader request such as that suggested above.

7/ Cf. Nixon v. Sampson, 389 F. Supp. 107, 121 (D.D.C. 1975).

government surveillance would also be available to any other person making a similar request.[8/] There may be a risk of confidential communications being disclosed to the public, if the contents of any communications which have been intercepted is sought under FOIA.

4. Scope of exemptions and standards for review

a. Classified information

It is likely that the agencies named above will deny, at least in part, any requests for information on surveillance of consultants to the Marianas. That denial will probably be based primarily on the first of the Act's exemptions:

> ". . . Matters that are -- (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are

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8/ Some government agencies adopted the practice of treating any request by an individual for information pertaining to himself as a request under the Privacy Act rather than the Freedom of Information Act. Although there are some inconsistencies between procedural sections of the two acts, it seems clear that the Privacy Act does not prevent an individual from obtaining information which would be available to others under FOIA. Correspondence on this subject between Senator Kennedy and the Department of Justice and Senator Kennedy's related remarks are reprinted in S. Comm. on Gov't. Operations & H. Comm. on Gov't. Operations, 94th Cong., 2d Sess., Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579) at 1173-88 (1976).

in fact properly classified pursuant to such Executive order;" 9/

That is, the document in question must be one which is both classifiable, because of its substance, under an executive order, and properly classified according to procedures prescribed in that order. 10/

In Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) the Supreme Court had held that exemption 1 11/ did not permit compelled disclosure of documents classified pursuant to executive order nor did it permit an in camera inspection of documents to sift out "nonsecret" components (410 U.S. at 81). The 1974 amendments to the Freedom of Information Act, however, specifically overruled Mink, providing for in camera review, at the discretion of the court, and adding the "in fact, properly classified" clause to exemption 1. 12/ Courts, especially in the

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9/ Recent cases in which this exemption has been invoked in support of government refusals to grant access to records include Phillippi v. Central Intelligence Agency, Civ. Action No. 76-1004 (D.C. Cir., November 16, 1976); Military Audit Project v. Bush, 418 F. Supp. 876 (D.D.C. 1976).

10/ See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (1975), cert. denied, 95 S.Ct. 1555 and 1999 (1975) (but where there is a classification stamp court would allow a presumption of regularity in the classification procedures); Shaffer v. Kissinger, 505 F.2d 389, 391 (D.C. Cir. 1974) (in a case decided before clause B was added, the court held that the agency had to demonstrate that documents were properly classified).

11/ Which, at that time applied to matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."

12/ See S. Rep. No. 93-1200 [Conference Report], 93d Cong., 2d Sess. 8-13 (1974).

District of Columbia Circuit (which has the large majority of FOIA cases) have demonstrated that they are willing to make in camera examinations of documents when necessary and will not uphold an agency determination based on nothing but conclusory statements in an affidavit by the agency which affords no means by which the plainitff, the trial court, or the appellate court can evaluate the validity of the claim of exemption.[13/]

Even before the 1974 amendments, the D.C. Circuit had taken the position that courts, in enforcing the FOIA, should adopt standards to:

> "(1) [A]ssure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

The court emphasized that such a detailed evaluation would be necessary since "[i]t is quite possible that part of a document should be kept secret while part should be disclosed." 484 F.2d at 825. Judge Wilkey, writing for the

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13/ See Phillippi v. Central Intelligence Agency, Civ. Action No. 76-1004 (D.C. Cir. Nov. 16, 1976) (the court made some rather specific suggestions as to how appellant, a journalist who had requested all agency records related to alleged efforts by the CIA to convince the news media not to make public what they had learned about the Glomar Explorer, might challenge, through discovery procedures, the agency's justification); Military Audit Project v. Bush, 418 F. Supp. 876 and 880 (1976).

court in Vaughn v. Rosen, suggested that effective evaluation of an exemption claim

> "could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document." 484 F.2d at 827. 14/

Executive Order 11652 (3 C.F.R. § 339) establishes policies and procedures for classification, and exemption 1 is available only as to documents classified as provided by this order. Its introductory paragraph states:

> "The interests of the United States and its citizens are best served by making information regarding the affairs of government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch."

In determining whether material should be classified

> "The test for assigning 'Confidential'15/ classification should be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security." § 1(C) (footnote added).

14/ In his footnote to that statement, Judge Wilkey cited the opinion in Sterling Drug, Inc. v. F.T.C., 450 F.2d 698 (1971) in which

> "we remanded a FOIA case to the trial court because it was impossible to determine from the record if the trial court had considered whether all of the disputed information was exempt or whether part was exempt and part not." 484 F.2d at 827 n.22.

15/ Since any properly classified material is exempt from disclosure under the Freedom of Information Act, it is not, of course, necessary to determine whether a higher classification than "confidential" would be appropriate.

Thus, one commentator has suggested:

> "[T]he relevant minimum criterion for proper classification appears to be that there be no substantial doubt that the release of the information could reasonably be expected to cause damage to the national security." 16/

It is unclear from decisions to date whether courts will be willing to go beyond the procedural aspects of classification and make their own determinations about the likelihood that "damage to the national security" 17/ will result from disclosure of documents an agency seeks to withhold. The development of standards in this area is somewhat hampered by the fact that the inspection of such documents will be conducted in camera and the specifics of the judge's reasoning will not be reported in his opinion if he decides against disclosure. While in camera review is important, a requirement that the agency justify its decision to the plaintiff may be more useful in that specific arguments against classification can then be formulated.

16/ M. Halperin, Judicial Review of National Security Classifications by the Executive Branch after the 1974 Amendments to the Freedom of Information Act, 25 Am. Univ. L. Rev. 27, 32 (1975).

17/ Indeed, the Conference Report on the 1974 amendments suggested that courts give "substantial weight" to agency affidavits concerning classified documents. S. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974).

Interpretations of the term "national security" in the freedom of speech and search and seizure contexts could be applied by analogy, but the decisions in the FOIA area to date do not evidence a domestic/foreign intelligence distinction applicable to the release of information.

b. Other FOIA exemptions

A second statutory exemption which might be invoked is b(3) "matters that are specifically exempted from disclosure by statute." The CIA, in the Phillippi case[18/] asserted that this exemption was applicable since 50 U.S.C. § 403(d)(3) provides:

> "[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

The court did not reject this argument entirely but ordered the CIA to provide public affidavits giving more detail as to the basis for its refusal to confirm or deny the existence of the requested records (Slip op. at 8) stating:

> "The District Court's order relied on the third exemption to the FOIA and on 50 U.S.C. §§ 403(d)(3) and 403g. Appellant contends that § 403(d)(3) is not a statutory authorization to withhold information within the meaning of 5 U.S.C. § 552(b)(3). We reject this argument. See S. Rep. No. 93-854, 93d Cong., 2d Sess. 16 (1974); H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974). If the Agency can demonstrate, see 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975), that release of the requested information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods, it is entitled to invoke the statutory protection accorded by 50 U.S.C. § 403(d) and 5 U.S.C. § 552(b)(3)." Slip op. at 12-13 n.14.

But this would not change the nature of the proof required:

> "On remand the District Court may also consider the applicability of the FOIA's first exemption, which applies to classified information. The Agency claimed this exemption in

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18/ Phillippi v. Central Intelligence Agency, Civ. Action No. 76-1004 (D.C. Cir. 1976).

> its first response to appellant and at all subsequent stages of this proceeding. Since information which could reasonably be expected to reveal intelligence sources and methods would appear to be classifiable, see Executive Order 11652, supra note 2, 3 C.F.R. at 340, and since the Agency has consistently claimed that the requested information has been properly classified, inquiries into the applicability of the two exemptions may tend to merge." Id.

Finally, the agencies might seek to rely on the fifth exemption,

> "inter-agency or intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency;"

especially as to summaries of or recommendations based on any intercepted conversations. Exemption 5, however, "requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other" (EPA v. Mink, 410 U.S. 73, 89 (1973)) and "purely factual material appearing in those documents [internal memoranda] in a form that is severable without compromising the private remainder of the documents" must be disclosed (410 U.S. at 91).

B. Privacy Act

The Privacy Act (5 U.S.C. § 552a) requires federal agencies to permit an individual[19/] to have access to

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19/ "Individual" for purposes of the Privacy Act means "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2).

government records which pertain to him. Thus this Act is a primary method by which a citizen can determine what information the government maintains on him including that which might fall within the Freedom of Information Act exemption for

> "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

The Privacy Act is of very limited usefulness for the purpose of obtaining records related to any surveillance of American consultants in the Marianas, however. The Privacy Act authorizes agency rules exempting systems of records from most of its provisions (including those requiring disclosures to individuals about records which relate to them and providing for judicial review of agency refusals of requests) if the system of records is "maintained by the Central Intelligence Agency" (5 U.S.C. § 552a(j)(1)) and the CIA has adopted regulations so exempting a large portion of its records (32 C.F.R., part 1901). Further, the Privacy Act authorizes any agency, by regulation, to exempt from specified sections, including the disclosure provisions (d), certain types of records including those which are "subject to the provisions of section 552(b)(1) of this title [the FOIA exemption for classified information]" 5 U.S.C. § 552a(k)(1), and this is implemented in most agencies' regulations. Thus an attempt to obtain

classified information under the Privacy Act would raise the same issues discussed in connection with the FOIA, but without any significant possibility of judicial review.

Because there is a slight possibility that some records would be available under the Privacy Act but not under FOIA, and because there are no search fees (only copy fees) under the Privacy Act (5 U.S.C. § 552a(f)(5)), it would seem advisable in addition to the FOIA request, for each individual who may have been the object of surveillance also to request any additional information available to him under the Privacy Act.

C. Congressional inquiry

We have learned that the Senate Select Committee on Intelligence has held hearings on reports that the Central Intelligence Agency has conducted surveillance activities in the Pacific Islands of Micronesia. 20/ This Committee was established, following the Church Committee's revelations of improper CIA activities, on May 19, 1976 by

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20/ Woodward, "Inouye Panel will probe CIA role in Micronesia," Washington Post, Tuesday, December 21, 1976, p. A-2.

On January 24, 25 and 26, 1977,

"Committee met in closed session to receive testimony from witnesses (whose names were not released) concerning allegations of improper activities of the Central Intelligence Agency in Micronesia." 123 Cong. Rec. D49, D55, D58 (1977).

Senate Resolution 400.[21/] The purpose of the Committee, as stated in that resolution, is:

> "to oversee and make continuing studies of the intelligence activities and programs of the United States Government, and to submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs."

Section 5 of the Resolution gives the Select Committee broad powers to obtain information on intelligence agency conduct:

> "(a) For the purpose of this resolution, the select committee is authorized in its discretion (1) to make investigations into any matter within its jurisdiction, . . . (4) to hold hearings, . . . (6) to require, by subpena or otherwise, the attendance of witnesses and the production of correspondence, books, papers, and documents . . . ."

The Resolution also provides procedures by which the Committee is to protect classified information; a vote of the Senate is required for disclosure over Presidential objection. Section 8.

It appears from the Resolution and related statements on the Church Committee investigation that there is no question but that the Committee's power to obtain information on any Micronesian surveillance is much greater than that of any individual or group of

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21/ 122 Cong. Rec. S7563 (1976).

individuals under the Freedom of Information Act or the Privacy Act. The Committee would not be compelled to disclose any information it might obtain to individuals who were the subject of such surveillance.

II. Legality of Electronic Surveillance

A. Wiretap provisions of Title III, Omnibus Crime Control and Safe Streets Act of 1968

1. General

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) prohibits interception of wire or oral communications except in accordance with the statutory provisions and provides a civil damage remedy for persons subjected to illegal surveillance.

2. Geographic scope

It is doubtful, however, that this statute would be applicable to any conduct taking place entirely in the Marianas, even if the illegal action were conducted by an agency or agent of the United States government.[22/] The

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22/ I have assumed that we are not considering the legality of actions by the government of Micronesia -- which may or may not be an agency of the United States Government depending on the statute being applied. See People of Saipan v. United States Department of the Interior, 502 F.2d 90, 96 (9th Cir. 1974) holding that the trust territory government is not an agency subject to judicial review under the Administrative Procedure Act or the National Environmental Policy Act; Porter v. United States, 496 F.2d 583 (Ct. Cl. 1974) holding that the government of the trust territory is not an agency of the United States Government for purposes of enforcing the contract in question; but see Groves v. United States,

(Footnote cont'd on next page.)

jurisdictional bases of Section 2511 are explained in the legislative history as follows: the blanket prohibitions of subsection (a), applicable to

> "any person who willfully intercepts, endeavors to intercept or procures any other person to intercept any wire or oral communication;"

insofar as they apply to wire communications are justified under the commerce power:

> "Since the facilities used to transmit wire communications form part of the interstate or foreign communications network, Congress has plenary power under the commerce clause to prohibit all interception of such communications, whether by wiretapping or otherwise." S. Rep. No. 1097, U.S. Code Cong. & Ad. News, 90th Cong., 2d Sess. 2180 (1968).

The prohibition on interception of oral communications, however, is based on the congressional power to protect individuals' rights to privacy. Since this latter concept had a somewhat less certain constitutional foundation, the drafters of Title III also added subsection (b), relying on "accepted jurisdictional bases under the commerce clause and other provisions of the Constitution to prohibit the interception of oral communications." Id. Subparagraph

(Footnote cont'd from previous page.)

533 F2d 1376, 1386 (5th Cir. 1976) holding that the Government of the Trust Territory of the Pacific Islands is an agency of the United States for purposes of Section 911(a)(1) of the Internal Revenue Code.

I have also assumed that we are not concerned with the legality of the actions of individuals, whether or not citizens of the United States, who are not agents of the United States Government.

(b)(v) makes Title III applicable to

> "any person who --
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> "(b) willfully uses, endeavors to use or procures any other person to use or endeavor to use any electronic, mechanical or other device to intercept any oral communication when --
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> ". . . .
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> "(b) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;"

a. Status of the Trust Territory

The Trust Territory of the Pacific Islands (of which the Marianas form a part) is not specifically included in the statute's coverage nor is there any indication that the term "territory" includes the trust territory. Courts have noted, in other contexts "that the Trust Territory is not a territory or possession, because technically the United States is a trustee rather than a sovereign."[23/] The general rule as to applicability of federal legislation to the trust territory was stated by the District Court in People of Enewetak v. Laird, 353 F. Supp. 811 (D. Hawaii 1973), a suit seeking to enjoin military tests being conducted in the trust territory which failed to comply with the National Environmental Policy Act and related regulations:

> "Although the United States, pursuant to Article 3 of the Trusteeship Agreement with the United Nations, has 'full powers of administration, legislation, and jurisdiction,'

23/ People of Saipan v. United States Department of the Interior, 502 F.2d 90, 95 (9th Cir. 1974) (holding that the trust territory government, like the government of other "territories" was immune from judicial review under the Administrative Procedure Act and National Environmental Policy Act).

> federal legislation is not automatically applicable to the Trust Territory. Instead, Congress must manifest an intention to include the Trust Territory within the coverage of a given statute before the courts will apply its provisions to claims arising there. Such an intention is usually indicated by defining the term 'State' or 'United States' as used in the legislation to include the Trust Territory. Hence, a problem of statutory construction arises when a given federal statute -- such as NEPA -- is silent on the extent of its coverage. In such instances, the courts must find the lawmakers' intent by an investigation of the history, character and general aim of the legislation." 353 F. Supp. at 815.

In a footnote to the above quotation, the court cited numerous statutes in which the term "State" or "United States" has been defined as including the trust territory, and only one which specifically excluded the trust territory from the definition of a "State."[24/] The court observed that many of the statutes including the trust territory were environmental control statutes. The court found, from evidence such as the use of the term "nation" in the statute, its

> "expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment -- not merely United States citizens located in the 50 states," 25/

and references in the legislative history to the world-wide nature of environmental concerns and the necessity for broad construction of the statute, that NEPA applied to actions in

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24/ 353 F. Supp. at 815 n.8.

25/ 353 F. Supp. at 816.

the trust territory, even though it was not specifically included.[26/]

Broad language of the type found in NEPA is not characteristic of the wiretap provisions of Title III, however, and although there are no cases considering the applicability of the wiretap provisions to the trust territory, it has been held that "the federal statute governing wiretapping and eavesdropping, 18 U.S.C. § 2510, et seq. has no application outside of the United States."[27/]

b. Acts creating jurisdiction

Although the Act is not likely to be found applicable to conduct which took place entirely within the Trust Territory, communication of orders for or the results of surveillance or shipment of devices to be used for electronic eavesdropping from agency headquarters in a state (or the District of Columbia) to agents in the Marianas would be conduct within the geographical limits of the Act's coverage.[28/]

26/ The court did not, however, cite any other case in which the trust territory, although not specifically referred to, had been held to be included in a federal statute.

27/ United States v. Toscanino, 500 F.2d 267, 279 (2d Cir. 1974), involving use in a criminal case of evidence obtained in Uraguay by agents of the United States government.

28/ Apparently the possibility of establishing illegality under the Act by this route was not considered in the Toscanino decision.

3. "National security" exception

Even if the nature of the facilities used to transmit or intercept the consultants' communications bring these actions within the general coverage of Title III, a claim of exemption from the statutory restrictions and procedures is still almost certain to be made, based on the argument that the President has broad constitutional powers to conduct surveillance aimed at protecting the national security. Section 2511(3) is a disclaimer of congressional intent to limit presidential power in the much-litigated "national security" area:

> "Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except if necessary to implement that power."

The Supreme Court has held that

> "Section 2511(3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such powers as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them. This view is reinforced by the general context of Title III." United States v. United States District Court for the Eastern District of Michigan (Keith), 407 U.S. 297, 303 (1972). 29/

Thus if any surveillance conducted in the Marianas occurred only after a valid determination by the President that it was necessary for one of these national security purposes, the surveillance would not be subject to the specific requirements of Title III.

It is not clear from judicial decisions to date what is required to show such a determination and whether it must also be shown that the determination was correct in order to make Title III inapplicable. In Keith, the majority seems to have accepted as sufficient the affidavit of Attorney General Mitchell, stating that the conversations in question

> ". . . were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect

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29/ The Keith case arose from a criminal proceeding in which defendants were charged with conspiracy to destroy government property in connection with the bombing of a CIA office in Ann Arbor, Michigan.

> the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney General." Quoted, 407 U.S. at 300 n.2.

But Justice White, concurring, found this affidavit insufficient because it failed to indicate either that the surveillance was undertaken "to protect against foreign attack, to gather foreign intelligence or to protect national security information" or "that the surveillance was necessary to prevent overthrow by force or other unlawful means or that there was any other clear and present danager to the structure or existence of the Government." 407 U.S. at 341.

The applicability of Title III was further defined in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976), a suit for damages brought by individual members of the Jewish Defense League (JDL) whose conversations had been electronically overheard. The court held that actions which exceeded the President's constitutional power were not within the exemption of Section 2511(3). In determining whether that power had been exceeded, the court did not limit itself to the Attorney General's

affidavit. 516 F.2d at 663-64.[30/]

In the most recent case considering whether civil damages could be recovered by a person subjected to illegal electronic surveillance, Halperin v. Kissinger, Civil Action No. 1187-73 (D.D.C. Dec. 16, 1976), the District Court did not directly address the question of whether the surveillance in question[31/] was properly excluded from the coverage of Title III but concluded only that, in view of the confused state of the law prior to Keith and Zweibon, "defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance." Slip op. at 6.

30/ The affidavit stated:

> "The surveillance of this telephone installation was authorized by the President of the United States, acting through the Attorney General in the exercise of his authority relating to the nation's foreign affairs and was deemed essential to protect this nation and its citizens against hostile acts of a foreign power and to obtain foreign intelligence information deemed essential to the security of the United States . . ." 516 F.2d at 607.

With respect to the delegation of presidential authority, the court implied that if expertise in foreign affairs (as opposed to the legal expertise of judges) was required to evaluate the necessity of warrantless wiretaps, it was strange that the President had delegated his authority in this area to the Attorney General rather than to the Secretary of State. 516 F.2d at 644.

31/ Surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy.

B. Constitutional limitations

While courts have held that presidential power to conduct "national security" eavesdropping is not limited by the provisions of Title III, they have also held that such actions are subject to constitutional limitations. The Fourth Amendment's prohibition on unreasonable searches has been held to mean that, except in limited circumstances, a warrant must be issued by a neutral magistrate in advance,[32] and electronic eavesdropping, with or without physical trespass, is a form of "search."[33] The Supreme Court has noted that the Fourth Amendment is not the only restriction on government surveillance; First Amendment rights may also be infringed by electronic eavesdropping on conversations and protected political expression may often be the target of surveillance conducted under the rubric of "national security."[34]

1. Territorial scope

It is clear that the Bill of Rights protects United States citizens from actions of the United States

32/ The remainder of this discussion assumes that, if there was surveillance of American consultants in the Marianas, it took place without a warrant. If surveillance with a warrant took place, the question would then be whether there are any constitutional obligations to reveal the tap analogous to the statutory requirements of Title III (18 U.S.C. § 2518(8)(d)).

33/ United States v. United States District Court, 407 U.S. 297, 313 (1972), citing Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Silverman v. United States, 365 U.S. 505 (1961).

34/ 407 U.S. at 313-14.

government, even when those actions take place outside the territorial boundries of the United States.[35/] While dicta in some wiretapping cases suggest that aliens and "foreign agents" operating in the United States may be entitled to lesser protection,[36/] it cannot reasonably be argued that American consultants, assisting the people of the Trust Territory in peaceful, lawful and open negotiations fully consistent with United States policy and obligations under the Trusteeship Agreement[37/] were engaged in any conduct which would justify depriving them of their rights as citizens.

35/ Reid v. Covert, 354 U.S. 1, 5-14 (1956), citing Best v. United States, 184 F.2d 131, 139 as to extra-territorial protection of Fourth Amendment rights. 354 U.S. at 9 n.10.

In United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974), the court of appeals extended this protection to "aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States."

Since the consultants involved here were American citizens, it is not necessary to pursue arguments that United States agencies should be restricted in actions taken in the Marianas, even against people who are not American citizens, by the Bill of Rights, the comparable guarantees contained in the Trust Territory Code (1 TTC § 3 employs the language of the Fourth Amendment) adopted with the approval of U.S. officials and construed with reference to American case law, or the general obligations to protect individual rights undertaken by the United States in the Trusteeship Agreement (Art. 7).

36/ See analysis of the foreign/domestic security distinction, infra.

37/ See especially Art. 6.1.

2. Warrant requirement for "domestic security" surveillance

The constitutional standards applicable when "national security" considerations are claimed to justify warrantless[38/] electronic surveillance have been extensively discussed in several cases decided since the enactment of Title III. A distinction has been drawn between surveillance of "domestic" and "foreign" organizations. United States v. United States District Court (Keith), 407 U.S. 297 (1972), the most recent case involving this issue to come before the Supreme Court, dealt only with alleged threats of domestic subversion:[39/]

> "There [was] no evidence of any involvement, directly or indirectly, of a foreign power." 407 U.S. at 309.

The Court distinguished the two types of surveillance as follows:

> "Section 2511(3) refers to 'the constitutional power of the President' in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a 'foreign power'; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as 'national security' threats,

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38/ There are apparently no reported cases involving a "national security" wiretap for which a warrant was obtained.

39/ The issue was whether the government would be required to disclose electronic surveillance information to a defendant charged with the bombing of a CIA office in Michigan.

> the term 'national security,' is used only in the first sentence of § 2511(3), with respect to the activities of foreign powers. This case involves only the second sentence of § 2511(3), with the threat emanating -- according to the Attorney General's affidavit -- from 'domestic organizations.' Although we attempt no precise definition, we use the term 'domestic organization' in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies. No doubt there are cases where it will be difficult to distinguish between 'domestic' and 'foreign' unlawful activities directed against the Government of the United States where there is collobora-tion in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case." 407 U.S. at 309 n.8.

Throughout this opinion, the Court emphasized that its holding was limited to warrant requirements in the case of surveillance of domestic organizations. 407 U.S. at 321, 322.

The Court reasoned that it was necessary to balance "the duty of Government to protect the domestic security" and the possibility that a warrant requirement might unduly frustrate such efforts against "the potential danger posed by unreasonable surveillance to individual privacy and free expression" and the possibility that a warrant requirement would better protect the freedom and privacy of citizens. 407 U.S. at 314-15. Rejecting the government's argument that internal security matters are too complex for judicial evaluation and that national security surveillance would be unduly delayed

and its secrecy endangered by a warrant requirement, the Supreme Court held that, in circumstances such as those of the case before it, exercise of the President's domestic security powers in a manner compatible with the Fourth Amendment required "an appropriate prior warrant procedure." 407 U.S. at 320.[40/]

In a footnote to its opinion, the Court referred, without further comment, to "the view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved" 407 U.S. at 322 n.20 (citations omitted).

3. Warrant requirement for "foreign security surveillance" of a domestic organization

A few years later, the Court of Appeals for the D.C. Circuit addressed a related question in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976), a suit for civil damages for allegedly illegal electronic surveillance. In a lengthy opinion, the court considered whether a warrant was required for surveillance of domestic organizations whose activities might have an impact on U.S. foreign relations. The United States contended, and the District Court had found, that surveillance of members of the Jewish Defense League (JDL) was "motivated

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40/ Because the surveillance in this case was unlawful in the absence of a warrant, the Court required disclosure of the intercepted communications to the accused in accordance with Alderman v. United States, 394 U.S. 165 (1969).

by foreign threats to the national security," 516 F.2d at 608, because the activities of the JDL (some legal and some illegal) created "the possibility of international embarrassment or Soviet retaliation against American citizens living in Moscow," 516 F.2d at 609. As the court of appeals realized, the Zweibon case

> "pose[d] the problem of the meaning and scope of the Keith decision and the validity and viability of any distinction between surveillance justified on the basis of foreign, as opposed to domestic, threats to the national security." 516 F.2d at 613.41/

41/ In a footnote, the court gave its understanding of these two terms:

> "'[I]nternal security' and 'domestic security' will refer to threats to the structure or existence of the Government which originate directly from domestic organizations which are neither agents of nor acting in collaboration with foreign powers, and 'internal security' or 'domestic security' surveillance will refer to surveillance which is predicated on such threats. . . . 'Foreign security' will refer to threats to the structure or existence of the Government which emanate either directly or indirectly from a foreign power . . . and a 'foreign security' surveillance will refer to surveillance which is predicated on such threats. A surveillance is a foreign security surveillance regardless of the stimulus that provoked the foreign power; thus the surveillance in this case will be treated as a foreign security surveillance even though the Soviet threats were provoked by actions of a hostile domestic organization. We believe such treatment is required by the limited holding of the Supreme Court in Keith. . . .
>
> ". . . our analysis proceeds with the recognition that there may be no practical or logical way to differentiate national security situations from other situations within the President's foreign affairs powers." 516 F.2d at 613 n.42.

The court of appeals analyzed decisions relating to presidential powers in foreign affairs and national defense and concluded that, even in these areas, "these cases . . . unqualifiedly subject the President to constitutional limitations . . ." 516 F.2d at 627. Thus, as the Supreme Court had held in Keith, the significant question was not whether there was a legitimate need for the surveillance but whether a warrant requirement would unduly frustrate the government's legitimate objective in such cases, 516 F.2d at 640, which was to be balanced against the "convergence of First and Fourth Amendment rights" (suggested in Keith) which was clearly present because "many of the JDL activities which antagonized the Soviet government were clearly protected exercises of First Amendment rights," 516 F.2d at 634. After considering in detail the five "possible justifications for exempting such surveillance from prior judicial scrutiny"[42/] the court found that those arguments "do not suggest the warrant procedure would actually fetter the legitimate

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42/ "[(1) T]he "judicial competence" justification, . . . (2) the danger of 'security leaks' which might endanger the lives of informants and agents and which might seriously harm the national security; (3) the fact that such surveillance is of the 'ongoing intelligence gathering' type and that, since criminal prosecutions are less likely, Fourth Amendment protections are not as essential as in a normal criminal context; (4) the possibility that the delay involved in the warrant procedure might result in substantial harm to the national security; and (5) the fact that the administrative burden on the courts or the Executive Branch which would result from such a requirement would be enormous." 516 F.2d at 641.

intelligence gathering functions of the Executive Branch." 516 F.2d at 651. The court, therefore held:

> "[A] warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if the surveillance is installed under presidential directive in the name of foreign intelligence gathering for protection of the national security." 516 F.2d at 614.

Although the holding was thus limited (the question of whether the JDL might have been an agent of or acting in collaboration with Israel was not considered) the court also expressed the view that:

> "[A]bsent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional. . . ." Id.

And the court's reluctance to allow anything but a limited "emergency" exemption from the warrant is evident in similar dicta throughout the case:

> "[o]ur analysis would suggest that, absent exigent circumstances, no wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought." 516 F.2d at 651.

> "And although we doubt that an exception to the warrant requirement should be created even for the activities of foreign agents or collaborators, at least such an exemption would be more 'carefully delineated' than an exception allowing warrantless wiretapping whenever the activities of domestic groups incur the wrath of a foreign power or affect in any manner the conduct of our foreign affairs." 516 F.2d at 654-55.

4. The "reasonableness" standard

Although its holding did not require it to do so, the court of appeals in Zweibon analyzed the factors that a judge should consider when asked to issue a warrant for "national security" electronic surveillance. 516 F.2d at 655-59. The purpose of such proposed surveillance would have to be found to be the gathering of foreign intelligence information, but the court disagreed with the statement of the Third Circuit in United States v. Butenko, 494 F.2d 593 (3d Cir. 1974), cert. denied, 419 U.S. 881 (1974), that such a finding would be sufficient to justify the search as "reasonable" under the Fourth Amendment. The Zweibon court indicated that the judge should also consider the ratio of relevant to irrelevant information that could be expected to be obtained from the tap, the urgency of the need for the information, and the difficulty of obtaining the information by other, less intrusive methods:

> "In short, a judge could require a showing that the subject of the surveillance is hostile to the Government and that alternative means of obtaining the information, such as subpoenas or routine FBI questioning, have been exhausted or would prove to be unsuccessful or inconsistent with the information gathering goals." 516 F.2d at 658. (emphasis in original).

An appropriate warrant would also impose limits on surveillance:

> "Moreover, a judge could pass on the reasonableness of the proposed scope or duration of the surveillance, and could grant renewals based on the success of an initial period of surveillance." Id.

Most recently, the United States District Court for the District of Columbia has considered the constitutionality of a warrantless wiretap installed on the home telephone of Morton Halperin as part of the Nixon Administration's program of electronic surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy of the United States.[43/]

The district court in Halperin followed an approach slightly different from that suggested by the Keith and Zweibon opinions. Instead of determining whether the Fourth Amendment, as interpreted in those cases, required a warrant, the court "assum[ed] arguendo the inapplicability of the warrant provision." Slip op. at 7. Even if a warrant were not required, said the court, "there can be no serious contention that the Fourth Amendment's independent requirement of reasonableness is suspended in the area of national security searches and seizures." Id. To determine reasonableness,

> "the Court must examine and balance the varying interests presented here; i.e., 'the duty of the Government to protect the domestic [and foreign] security, and the potential danger posed by [allegedly] unreasonable surveillance to [plaintiffs'] privacy and free expression.' Keith, supra, 407 U.S. at 314-15." Id. (bracketed material in District Court opinion).

43/ Halperin v. Kissinger, Civil Action No. 1187-73 (D.D.C. Dec. 16, 1976).

The court found that the Halperin tap "was maintained for a period of twenty-one months" with "no . . . reviews or evaluation of the material obtained" and "no attempt . . . to minimize the interception of plaintiffs' conversations." Slip op. at 8-9. This "dragnet which lacked temporal and spatial limitations," the court held was "per se unreasonable under the Fourth Amendment and unjustified by any possible exception thereto." Slip op. at 9.

Although neither the court of appeals in Zweibon nor the district court in Halperin suggested that surveillance of activities which were in themselves legal would be per se unreasonable, both implied that activities to be the subject of "national security" surveillance would be at least in part illegal.

C. Damages and the "good faith" defense

Keith did not involve the damage issue; the only question decided by the Supreme Court was whether the allegedly illegal wiretaps had to be disclosed to defendants in a criminal proceeding. Zweibon and Halperin, however, were both civil damage suits. After holding the wiretaps in question illegal, the Zweibon court stated:

> "If this were a criminal case, as in Keith, we could end our inquiry here. However, this is a civil suit for damages, and both the measure of damages and the allowable defenses will turn on whether the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), apply in this case, or whether appellants are relegated to the remedies afforded

> under the seminal decision of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619. Under the latter approach, only compensatory damages would be allowed, appellees could interpose a general 'good faith' defense, and jurisdiction would be premised upon 28 U.S.C. § 1331 (1970), which requires over a $10,000 amount in controversy . . . under a statutory theory, appellants could recover not only actual damages (with minimum liquidated damages computed at the rate of $100 per day for each day of violation), but also punitive damages and attorney's fees, and appellees could interpose only a narrow and specific good faith defense. This statutory remedy, however, is limited by 18 U.S.C. § 2520 (1970) to eavesdropping that is 'in violation of this chapter [Title III].' We must therefore determine whether appellees' actions violated the statute as well as the Constitution." 516 F.2d at 659.

Analyzing the legislative history of Title III and the interpretation by the Supreme Court in the Keith decision of its provisions as they relate to national security, the court of appeals found that "the remedies of the Title III should apply to unconstitutional exercises of presidential power." 516 F.2d at 664. Thus, if a wiretap is unconstitutional because a warrant should have been procured and was not or because, although a warrant may not have been required, the search itself did not satisfy the requirement of "reasonableness," a cause of action will exist under Title III.

The court then addressed the question of what defenses may be asserted in such an action and rejected

a "literal interpretation" of § 2520[44/] under which "appellees would in effect be held strictly liable for their actions and could assert no good faith defense." 516 F.2d at 670.

> ". . . [R]ather, we find that a good faith defense to liability, whether under the Bivens rationale or the statutory theory, will be established if appellants can demonstrate (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and (2) that this belief was itself reasonable." 516 F.2d at 671.

Under the circumstances of the Zweibon case, where the actions in question had taken place in the absence of judicial resolution of the scope of the President's inherent constitutional

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44/ Section 2520 provides:

> "Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person --
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law."

powers in national security surveillance, "the proper statutory good faith defense is identical with the common law good faith defense that would apply to the Bivens cause of action." 516 F.2d at 673. To establish this defense, the executive officials must demonstrate that they "acted under what they reasonably believed were the constitutionally inherent (and therefore statutorily exempt) powers of the President." 516 F.2d at 672. In a footnote, the court added that a good faith belief that warrantless national security surveillance of domestic organizations was constitutional could not be asserted in cases involving surveillance which took place after the Keith and Zweibon decisions. 516 F.2d at 673 n.279.

The district court followed somewhat different reasoning to reach the same result in Halperin. Because "at least until 1972, and perhaps until the 1975 Zweibon decision . . . the meaning and the limits of § 2511(3) were open issues," the court found that "defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance." Slip op. at 6. "Accordingly plaintiffs have no cause of action under Title III of the Omnibus Crime Control and Safe Streets Act of 1968." Slip op. at 7. Because the wiretaps on the Halperin family telephone were found to violate the reasonableness requirement of the Fourth Amendment, however, those defendants who were responsible for the taps (Nixon, Mitchell, and Haldeman)

could be held liable for compensatory damages (but not for other measures of damages which would have been available under Title III) under the rationale of the Bivens case.[45/] Slip op. at 13-14. The record as to the nature of the taps, "a seemingly political motive for the latter surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents," said the court "controverts such a defense [of subjective good faith]."[46/] Slip op. at 12-13. No determination of the amount of damages has yet been reported.

Thus the Zweibon and Halperin opinions indicate that it may be necessary for plaintiffs seeking recovery of damages for unconstitutional electronic surveillance (at least if it took place before those cases were decided) to show that the searches were unreasonable as well as that a warrant should have been obtained and was not.

45/ The difference between this interpretation and that of the Court of Appeals in Zwiebon is that the Court of Appeals had held that unconstitutional national security searches were outside of the § 2511(3) exemption and thus subjected their perpetrators to Title III liabilities, while the District Court treated unconstitutional surveillance conducted in the name of national security as a violation of constitutional rights but not of Title III.

46/ The Halperin complaint was dismissed as against several other defendants who were found not to have actively participated in or had any significant responsibility for the wiretaps in question. Among these defendants was Chesapeake & Potomac Telephone Company which, the court found, "acted in reliance upon a request from the highest executive officials and with assurances that the wiretap involved national security matters." Slip op. at 15-16.

D. Application to the Marianas consultants

Although the law in this area still is uncertain, the trend in the recent decisions discussed above suggests that it might be possible successfully to argue that any warrantless electronic eavesdropping on American consultants to the Marianas Political Status Commission was unconstitutional. It is evident that the activities of United States citizens acting as legal and economic consultants to the Political Status Commission posed no threat to "domestic security" as that term was used in Keith and Zweibon: there was no danger (and certainly no "clear and present danger") to the structure and existence of the United States government. Because of the strategic location of the Marianas the outcome of negotiations as to their political status (and the extent of future United States control) could be said to have had an effect on United States foreign relations.[47/]

The question then is whether the consultants were a domestic group whose activities might cause reaction

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47/ This factor was emphasized in hearings on the joint resolution approving the Covenant, Joint Resolution to Approve the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of American," and for Other Purposes: Hearings on S.J. Res. 107 Before the Committee on Interior and Insular Affairs, United States Senate, 94th Cong., 1st Sess. (1975).

The State Department, however, may have opposed any surveillance by the CIA. Woodward, CIA Bugging Micronesian Negotiations: State Department Calls it Improper, Files an Objection, Washington Post, Dec. 12, 1976.

from a foreign power (as in Zweibon but without any suggestion of illegal activity of the part of the group under surveillance) or a group which can be called an agent or collaborator of a foreign power. The fact that the United States had extensive control over the Trust Territory government, especially as to foreign affairs and defense, during the period of the negotiations supports the argument that the consultants to the Political Status Commission should be considered analogous to a domestic organization for purposes of the Fourth Amendment. If this is the case, electronic surveillance of the consultants' conversations with their clients was unconstitutional. If, however, a court were to hold that the consultants to the Political Status Commission should not be treated as a domestic organization since they were serving as agents of the Trust Territory Political Status Commission which is an entity independent of the United States government, it may still be possible to use the reasoning on which the Keith and Zweibon opinions were based to support an argument that prior judicial approval is required for surveillance of American citizens who are providing professional services to a party engaged in peaceful negotiations with the United States. The Zweibon court's answer to the argument that judges lack competence to understand and appreciate the considerations involved in a national security surveillance would be

equally true in this situation, as would that court's responses to the arguments about security leeks, delay, and administrative burden.[48/] The Zweibon court's comments as to the applicability of the Fourth Amendment in strategic (as opposed to criminal evidence gathering) surveillance are, if anything, even more appropriate to the Marianas situation:

> "In short, the premise behind the 'strategic information' rationale for abrogating the warrant procedure, the idea that the Fourth Amendment is limited to remedies in the criminal process, is anomalous, since it would suggest that the more innocent the individual the less protection his privacy interests merit." 516 F.2d at 649.

Not only did the consultants' activities constitute legal and protected speech, they may also have involved the attorney-client privilege, and they were directed at carrying out obligations of the United States under the Trusteeship Agreement.

If surveillance of the consultants were to be held unconstitutional only because of the absence of a warrant, defendants would be very likely to prevail on a "subjective good faith" defense as described in Zweibon and Halperin.[49/] During the period 1972-1975 (when any surveillance probably took

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48/ See 516 F.2d at 641-51 and the dicta cited supra as to lack of justification for any type of warrantless surveillance.

49/ Even without a damage recovery, however, there might be a moral victory of no little importance in having the government's actions declared unconstitutional.

place) the law as to the legality of warrantless national security surveillance activity related to foreign affairs was even less settled than it is now. Keith had dealt with a purely domestic case; Zweibon was not decided until 1975 and did not resolve the precise issue of the constitutionality of a warrantless search such as may have taken place in the Marianas. Thus it may be possible for defendants to show that

> "Executive officials acted under what they reasonably believed were the constitutionally inherent (and therefore statutorily exempt) powers of the President." 516 F.2d at 672.

Knowledge of an improper motive for the surveillance would, of course, make this defense unavailable.

The district court's decision in Halperin suggests, however, that the ability of the defendants to demonstrate a good faith belief that no warrant was required will not foreclose an argument that the search was per se unreasonable and thus unconstitutional.[50/] As in that case, analysis of the specific facts of the surveillance in question is required, and it would be necessary to learn more about the details of any surveillance which took place. Such information could come either through responses to Freedom of Information Act requests, through discovery after filing of a complaint, or from information that may be released

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50/ But the court of appeals in Zweibon had indicated that a case-by-case "reasonableness" approach would not be appropriate.

from hearings now being held by the Senate Select Committee on Intelligence.[51/] It would be useful to prove, for example, that there was no real need for the information sought (because, for example, it would have been revealed in due course during the negotiations); that the objectives of the surveillance were inconsistent with the treaty obligations of the United States under the Trusteeship Agreement to encourage self-determination for the Micronesians; that those responsible for the negotiations[52/] had not authorized the surveillance; that the consultants were not engaging in (or even suspected of engaging in) action harmful to the United States, much less illegal activities; that some of the advice given to the Political Status Commission was in the nature of an attorney-client communication; that the surveillance equipment remained in operation for a long time with no review of results; and that extensive amounts of

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51/ Information about the surveillance in Zweibon had come from criminal prosecutions of J.D.L. members other than the plaintiffs. 516 F.2d at 606. (There were findings of illegality in some of the related criminal proceedings. 516 F.2d at 606 n.16.)

The facts in the Halperin case were established "not only by the extensive discovery and documentary evidence in this case but also by wide-ranging Congressional investigations concerning the surveillance program." Slip op. at 10.

Closed hearings on intelligence activities in Micronesia have been held by the Senate Select Committee on Intelligence. See note 20, supra.

52/ The chief negotiator has apparently disclaimed knowledge of any electronic surveillance of the consultants. See note 47, supra.

material irrelevant to the alleged purposes of the tap were intercepted and recorded.

N.C.G.

cc: D.C. Siemer
M.S. Helfer