Office of the Attorney General
Washington, D. C. 20530

January 20, 1998

MEMORANDUM FOR THE HEADS AND INSPECTORS GENERAL
OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: Procedures for Lawful, Warrantless Monitoring of Verbal Communications

By Memorandum dated October 16, 1972, the Attorney General directed all federal departments and agencies to obtain Department of Justice authorization before intercepting verbal communications without the consent of all parties to the communication. This directive was clarified and continued in force by the Attorney General's Memorandum of September 22, 1980, to Heads and Inspectors General of Executive Departments and Agencies. It was then superseded, with new authorization procedures and relevant rules and guidelines, including limitations on the types of investigations requiring prior written approval by the Department of Justice, in the Attorney General's Memorandum of November 7, 1983. [1]

This Memorandum supersedes the aforementioned directives. [2] It continues most of the authorization procedures established in the November 7, 1983, Memorandum, but reduces the sensitive circumstances under which prior written approval of senior officials of the Department of Justice's Criminal Division is required. In particular, it reduces substantially the need for such prior approval in matters of public corruption. At the same time, it continues to require oral authorization from Department of Justice attorneys, ordinarily local Assistant United States Attorneys, before the initiation of the use of consensual monitoring in all investigations not requiring prior written approval. In addition, this Memorandum also reduces substantially, and eventually eliminates, the reporting requirement imposed on the departments and agencies.

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[1] As in all of the prior memoranda except for the one dated October 16, 1972, this memorandum only applies to the consensual monitoring of oral, nonwire communications, as discussed below. "Verbal" communications will hereinafter be referred to as oral.

[2] This memorandum is not intended to supersede or rescind Attorney General Order No. 1623-92 of August 31, 1992, which allows the Director of the Federal Bureau of Investigation to further delegate his approval authority in certain consensual monitoring situations.

The changes reflect the results of the exercise of the Department's review function for the last 20 years. This experience reflects that the departments and agencies have been uniformly applying the required procedures with great care, consistency, and good judgment, and that the number of requests for consensual monitoring that were not approved has been negligible.

The Fourth Amendment to the United States Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. §2510, et seq.), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.) permit government agents, acting with the consent of a party to a communication, to engage in warrantless monitoring of wire (telephone) communications and oral, nonwire communications. United States v. White, 401 U.S. 745 (1971); United States v. Caceres, 440 U.S. 741 (1979). Similarly, the Constitution and federal statutes permit federal agents to engage in warrantless monitoring of oral, nonwire communications when the communicating parties have no justifiable expectation of privacy.[3] Because such monitoring techniques are particularly effective and reliable, the Department of Justice encourages their use by federal agents for the purpose of gathering evidence of violations of federal law, protecting informants or undercover law enforcement agents, or fulfilling other, similarly compelling needs. While these techniques are lawful and helpful, their use in investigations is frequently sensitive, so they must remain the subject of careful, self-regulation by the agencies employing them.

The sources of authority for this Memorandum are Executive Order No. 11396 ("Providing for the Coordination by the Attorney General of Federal Law Enforcement and Crime Prevention Programs"); Presidential Memorandum ("Federal Law Enforcement Coordination, Policy and Priorities") of September 11, 1979; Presidential Memorandum (untitled) of June 30, 1965, on, inter alia, the utilization of mechanical or electronic devices to overhear nontelephone conversations; the Paperwork Reduction Act of 1980 and the Paperwork Reduction Reauthorization Act of 1986, as amended; and the inherent authority of the Attorney General as the chief law enforcement officer of the United States.

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[3] As a general rule, nonconsensual interceptions of wire communications violate 18 U.S.C. §2511, regardless of the communicating parties' expectation of privacy, unless the interceptor complies with the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2510, et seq.) or with the provisions of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.).

I. DEFINITIONS

As used in this Memorandum, the term "agency" means all of the Executive Branch departments and agencies, and specifically includes United States Attorneys' Offices which utilize their own investigators, and the Offices of the Inspectors General.

As used in this Memorandum, the terms "interception" and "monitoring" mean the aural acquisition of oral communications by use of an electronic, mechanical, or other device. Cf. 18 U.S.C. §2510(4).

As used in this Memorandum, the term "public official" means an official of any public entity of government, including special districts, as well as all federal, state, county, and municipal governmental units.

II. NEED FOR WRITTEN AUTHORIZATION

A. Investigations Where Written Department of Justice Approval is Required

A request for authorization to monitor an oral communication without the consent of all parties to the communication must be approved in writing by the Director or Associate Directors of the Office of Enforcement Operations, Criminal Division, U.S. Department of Justice, when it is known that:

(1) the monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above, or a person who has served in such capacity within the previous two years;

(2) the monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any State or Territory, or a judge or justice of the highest court of any State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties;

(3) any party to the communication is a member of the diplomatic corps of a foreign country;

(4) any party to the communication is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers;

(5) the consenting or nonconsenting person is in the custody of the Bureau of Prisons or the United States Marshals Service; or

(6) the Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorney General, or the United States Attorney in the district where an investigation is being conducted has requested the investigating agency to obtain prior written consent before conducting consensual monitoring in a specific investigation.

In all other cases, approval of consensual monitoring will be in accordance with the procedures set forth in part V. below.

B. Monitoring Not Within Scope of Memorandum

Even if the interception falls within one of the six categories above, the procedures and rules in this Memorandum do not apply to:

(1) extraterritorial interceptions; [4]

(2) foreign intelligence interceptions, including interceptions pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.);

(3) interceptions pursuant to the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. §2510, et seq.);

(4) routine Bureau of Prisons monitoring of oral communications that are not attended by a justifiable expectation of privacy;

(5) interceptions of radio communications; and

(6) interceptions of telephone communications.

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[4] Consensual monitoring conducted outside of the United States is not controlled by this memorandum. However, any extraterritorial investigative activity, including but not limited to consensual monitoring, requires the prior approval of the Criminal Division. Before conducting any such activity outside of the United States, agents should consult with their counsel's office and must consult with the Criminal Division's Office of International Affairs.

III. AUTHORIZATION PROCEDURES AND RULES

A. Required Information

The following information must be set forth in any request to monitor an oral communication pursuant to part II.A.:

(1) Reasons for the Monitoring. The request must contain a reasonably detailed statement of the background and need for the monitoring.

(2) Offense. If the monitoring is for investigative purposes, the request must include a citation to the principal criminal statute involved.

(3) Danger. If the monitoring is intended to provide protection to the consenting party, the request must explain the nature of the danger to the consenting party.

(4) Location of Devices. The request must state where the monitoring device will be hidden: on the person, in personal effects, or in a fixed location.

(5) Location of Monitoring. The request must specify the location and primary judicial district where the monitoring will take place. A monitoring authorization is not restricted to the original district. However, if the location of monitoring changes, notice should be promptly given to the approving official. The record maintained on the request should reflect the location change.

(6) Time. The request must state the length of time needed for the monitoring. Initially, an authorization may be granted for up to 90 days from the day the monitoring is scheduled to begin. If there is the need for continued monitoring, extensions for additional periods of up to 90 days may be granted. In special cases (e.g., "fencing" operations run by law enforcement agents or long-term investigations that are closely supervised by the Department's Criminal Division), authorization for up to 180 days may be granted with similar extensions.

(7) Names. The request must give the names of persons, if known, whose communications the department or agency expects to monitor and the relation of such persons to the matter under investigation or to the need for the monitoring.

(8) Trial Attorney Approval. The request must state that the facts of the surveillance have been discussed with the United States Attorney, an Assistant United States Attorney, or the previously designated Department of Justice attorney responsible for a particular investigation, and that such attorney concurs that the use of consensual monitoring is appropriate under this memorandum (including the date of such concurrence). The attorney must also concur that the use of consensual monitoring under the facts of the investigation does not raise the issue of entrapment. Such statements may be made orally.

(9) Renewals. A request for renewal authority to monitor oral communications must contain all the information required for an initial request. The renewal request must also refer to all previous authorizations and explain why an additional authorization is needed, as well as provide an updated statement as to the concurrence of the responsible trial attorney.

B. Oral Requests

Unless a request is of an emergency nature, it must be in written form and contain all of the information set forth above. Emergency requests in cases in which written Department of Justice approval is required may be made by telephone to the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations, or to the Assistant Attorney General, the Acting Assistant Attorney General, or a Deputy Assistant Attorney General for the Criminal Division, and should later be reduced to writing and submitted to the appropriate headquarters official as soon as practicable after authorization has been obtained. An appropriate headquarters filing system is to be maintained for consensual monitoring requests that have been received and approved in this manner. Oral requests must include all the information required for written requests as set forth above.

C. Authorization

Authority to engage in consensual monitoring in situations set forth in part II.A. of this Memorandum may be given by the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General or Acting Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the Director or an Associate Director of the Criminal

Division's Office of Enforcement Operations. Requests for authorization will normally be submitted by the headquarters of the department or agency requesting the consensual monitoring to the Office of Enforcement Operations for review.

D. Emergency Monitoring

If an emergency situation requires consensual monitoring at a time when one of the individuals identified in part III.B. above cannot be reached, the authorization may be given by the head of the responsible department or agency, or his or her designee. Such department or agency must then notify the Office of Enforcement Operations as soon as practicable after the emergency monitoring is authorized, but not later than three working days after the emergency authorization.

The notification shall explain the emergency and shall contain all other items required for a nonemergency request for authorization set forth in part III.A. above.

IV. SPECIAL LIMITATIONS

When a communicating party consents to the monitoring of his or her oral communications, the monitoring device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual monitoring must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, unless that agent or person is acting pursuant to a court order that authorizes the entry and/or trespass, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party. See United States v. Yonn, 702 F.2d 1347 (11th Cir.), cert. denied, 464 U.S. 917 (1983) (rejecting the First Circuit's holding in United States v. Padilla, 520 F.2d 526 (1st Cir. 1975), and approving use of fixed monitoring devices that are activated only when the consenting party is present). But see United States v. Shabazz, 883 F.Supp. 422 (D.Minn. 1995).

Outside the scope of this Memorandum are interceptions of oral, nonwire communications when no party to the communication has consented. To be lawful, such interceptions may take place only when no party to the

communication has a justifiable expectation of privacy. [5] Each department or agency must ensure that no communication of any party who has a justifiable expectation of privacy is intercepted.

V. NEED FOR ORAL AUTHORIZATION OF CONSENSUAL MONITORING WHERE NO WRITTEN APPROVAL IS REQUIRED

Prior to receiving approval for consensual monitoring from the head of the department or agency or his or her designee, a representative of the department or agency must contact the United States Attorney, an Assistant United States Attorney, or the Department of Justice attorney responsible for a particular investigation. Authorization may be obtained orally from this attorney. The attorney, in giving authorization, must concur as to both the legality and the propriety of the consensual monitoring in question.

Even in cases in which no written authorization is required because they do not involve the sensitive circumstances discussed above, each agency must continue to maintain internal procedures for supervising, monitoring, and approving all consensual monitoring of oral communications. Approval for consensual monitoring must come from the head of the agency or his or her designee. Any designee should be a high-ranking supervisory official at headquarters level.

Similarly, each department or agency shall establish procedures for emergency authorizations in cases involving non-sensitive circumstances similar to those that apply with regard to cases that involve the sensitive circumstances described in part III.D. above, including the follow-up oral authorization of the responsible trial attorney.

Records are to be maintained by the involved departments or agencies for each consensual monitoring that they have conducted. These records are to include the information set forth in part III.A. above.

VI. REPORTS

For a period covering the first twelve months following the promulgation of this Memorandum, the head of each department or agency, or his or her designee, shall make a one-time report to the Director of the Office of Enforcement Operations in the Criminal Division summarizing the results

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[5] For example, burglars, while committing a burglary, have no justifiable expectation of privacy. Cf. United States v. Pui Kan Lam, 483 F.2d 1202 (2d. Cir. 1973), cert. denied, 415 U.S. 984 (1974).

of consensual monitoring authorized pursuant to this Memorandum. This report shall contain the following information broken down by offense or reason for consensual monitoring: the number of requests for authorization; the number of emergency authorizations; the number of times that the monitoring provided information that corroborated or assisted in corroborating the allegation or suspicion; and the number of authorizations not used. Summaries of particularly illustrative uses of consensual monitoring, with identifying information deleted if necessary to avoid compromising ongoing investigations or sensitive investigative matters, should be included. This report shall be submitted in February of 1999.

Following this one-year period, the reporting requirement shall be rescinded. The rescinding of the reporting requirement does not, in any way, diminish the obligation of the departments and agencies to maintain records in a particular investigation consistent with the department's or agency's investigative responsibilities regarding pending or anticipated judicial proceedings. Such record keeping should continue to be sufficient to support the oversight responsibilities of the Executive and Legislative Branches.

Also in February of 1999, each department and agency shall submit to the Attorney General an inventory of all devices that are intended for the surreptitious interception of wire or nonwire communications, including devices used to intercept communications pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. This reporting requirement will likewise be rescinded with the submission of the February 1999 report.

VII. GENERAL LIMITATIONS

This Memorandum relates solely to the subject of consensual monitoring of oral communications except where otherwise indicated. This Memorandum does not alter or supersede any current policies or directives relating to the subject of obtaining necessary approval for engaging in nonconsensual electronic surveillance or any other form of nonconsensual interception.