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*file Domestic
Terrorism*

20 April 1982

MEMORANDUM

SUBJECT: United States Government Legal Authority to Deal With a Terrorist Kidnapping Incident Within the United States

I. BACKGROUND

1. Focus. The recent kidnapping and rescue of Brigadier General James Dozier, USA, Deputy Chief of Staff for Logistics and Administration, Allied Land Forces, Southern Europe, raises the question whether legal constraints would unduly hamper the United States Government in the event of a similar terrorist incident within the United States. Although to date the United States has been fortunate that a similar incident has not taken place within the United States, the specter of such terrorist kidnappings remains real. Thus, it is appropriate to ask whether departments and agencies with counterterrorism responsibilities in the United States have sufficient investigative authorities to meet the terrorist challenge.

2. Issues. To locate and free General Dozier, the Italian Government conducted a massive investigative effort. The Italian authorities systematically searched for and arrested known terrorists, employed telephone taps, mobile radio direction-finding units, roadblocks, physical surveillance, searches of ships leaving local harbors, and imposed curfews in certain localities. However, the lead that resulted in the General's rescue came from a jailed Red Brigade terrorist group member whom the Italian authorities persuaded, with the help of his family and a large payment of money, to provide information concerning the location of several Red Brigade safehouses. The Red Brigade was holding General Dozier in one of these safehouses. The activities Italian authorities undertook in the course of their efforts to locate and free General Dozier raise several questions concerning the U.S. Government's ability to undertake a similar successful counterterrorism operation within the United States:

a. What is the legal authority for U.S. Government action in response to a terrorist kidnapping incident?

b. What specific techniques would be available to the various U.S. Government departments and agencies which would investigate a terrorist kidnapping incident and what legal limitations would there be on the use of such techniques?

c. What techniques would be unavailable to the various U.S. Government departments and agencies which would investigate a terrorist kidnapping incident?

Answers to these questions must be analyzed in the context of two hypothetical situations: a domestic terrorist kidnapping and an international terrorist kidnapping, since the types of investigative techniques lawfully available for use may vary with the type of kidnapping involved.

3. Terrorist Kidnappings: Domestic v. International. For purposes of this discussion, a kidnapping conducted within the United States by a domestic terrorist group without international ties for the purpose of influencing the conduct of the United States Government constitutes a domestic terrorist kidnapping. In contrast, a kidnapping conducted within the United States by a foreign or international terrorist group for political ends, or by a domestic terrorist group for the purpose of influencing the conduct of a foreign government, civilian population, or international organization, constitutes an international terrorist kidnapping. The key distinction between the two types of kidnappings lies in the transnational nature of international terrorist kidnappings which "transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum."^{1/} Although both domestic terrorist kidnappings and international terrorist kidnappings conducted within the United States are equally in violation of the federal criminal code,^{2/} the United States Government may be able to employ some techniques and resources in response to international terrorist kidnappings under less restrictive standards than it can in response to domestic terrorist kidnappings.

^{1/} Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, §101(c), 50 U.S.C. §1801(c) (Supp. III 1979) (definition of international terrorism).

^{2/} 18 U.S.C. §1201 (Supp. III 1979).

II. BASIC LEGAL AUTHORITY FOR UNITED STATES GOVERNMENT
RESPONSE TO TERRORIST KIDNAPPING INCIDENT

4. Authority of Federal Law Enforcement Agencies. By virtue of a series of federal statutes, several federal law enforcement agencies have authority to respond in various ways to a terrorist kidnapping incident within the United States; however, only the Federal Bureau of Investigation has broad authority to respond.

a. Federal Bureau of Investigation (FBI). A terrorist kidnapping incident within the United States would violate the federal criminal code, which provides:

§1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(38)); or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title, shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(34) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(34)).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, state, or local agency, including the Army, Navy, and Air Force,

any statute, rule, or regulation to the contrary notwithstanding.^{3/}

Thus, a terrorist kidnapping incident within the United States will constitute a federal offense if (1) the victim is transported in interstate or foreign commerce,^{4/} (2) the kidnapping is done within the special maritime, territorial or aircraft jurisdiction of the United States,^{5/} or (3) the victim is a foreign official, internationally protected

3/ Id.

4/ The terms "interstate commerce" and "foreign commerce" are defined in the criminal code in their fullest constitutional sense. 18 U.S.C. §10 (1976).

5/ The criminal code defines the "special maritime and territorial jurisdiction of the United States" to include the high seas, waters within the admiralty and maritime jurisdiction of the United States but not within any State and vessels within such waters, vessels on the Great Lakes, federal lands, certain guano islands, and any aircraft owned, in part or whole, by the United States, its citizens, or its corporations while in flight over the high seas or waters within the admiralty or maritime jurisdiction but not within any State. 18 U.S.C. §7 (1976). The special aircraft jurisdiction to which the kidnapping statute refers includes aircraft belonging to the United States, aircraft last departing or next arriving in the United States, aircraft included in United States jurisdiction by an air piracy treaty, and aircraft leased bare bones to a United States person lessee, while such aircraft are in flight. 49 U.S.C. §1301(38) (Supp. III 1979).

person, or an official guest of the United States.^{6/} The FBI has the authority and responsibility to detect and investigate federal kidnapping offenses.^{7/} Two things are particularly noteworthy about the federal kidnapping statute in the context of an FBI investigation of a terrorist kidnapping incident. First, unless (1) the incident occurs within the special air, land and sea jurisdiction of the United States, (2) the victim is a covered foreign official, guest, or internationally protected person, or (3) the FBI has information to indicate that the victim has been transported in interstate or foreign commerce, the FBI may be unable to take action in a terrorist kidnapping incident for 24 hours following the kidnapping, after which it can take action based on the statutory presumption of transportation

^{6/} The term "foreign official" means a present or former chief of state, head of government, ministerial rank official, head of an international organization, a present officer or employee of an international organization duly notified to the United States, and an accompanying family member, while such persons are in the United States. The term "internationally protected person" means a chief of state, head of government, or foreign minister while outside his own country, and other officers or employees of governments or international organizations who are entitled to special protection under international law. The term "official guest" means a foreign national in the United States designated as an official guest by the Secretary of State. 18 U.S.C. §1116 (1976).

^{7/} 28 U.S.C. §533 (1976) and 28 CFR §0.85 (1980) (implementing Department of Justice regulations). The FBI has authority and responsibility to detect and investigate all federal criminal violations unless such duties are assigned by statute or otherwise to another agency. Enforcement of the federal kidnapping statute has not been assigned to another agency and thus remains the responsibility of the FBI.

in interstate or foreign commerce.^{8/} Second, the kidnapping statute's specific authorization to the Attorney General to request assistance from any federal, state or local agency, "including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding,"^{9/} in enforcing the statute's provisions against the kidnapping of covered foreign officials, guests, and internationally protected persons, appears to override the Posse Comitatus

^{8/} 18 U.S.C. §1201(b) (1976). The legislative purpose of the enactment of the presumption was to authorize the FBI to initiate investigation of any kidnapping in which the victim has not been released within 24 hours after the kidnapping. See S. Rep. No. 2820, 84th Cong., 2d Sess. (1956). One court has held this presumption unconstitutional for evidentiary purposes as without a rational basis. United States v. Moore, 571 F.2d 76 (2d Cir. 1978). Arguably, even in that jurisdiction the presumption may remain valid as a statutory predicate for initiation of an FBI kidnapping investigation. The FBI would have separate, nonstatutory authority to investigate international, but not domestic, terrorist kidnapping incidents within the United States during the initial 24-hour period in its counterintelligence role. Executive Order 12333, United States Intelligence Activities, §1.14, 46 Fed. Reg. 59941 (1981).

^{9/} 18 U.S.C. §1201(f) (1976).

Act prohibition on use of the Army and Air Force to execute the law,^{10/} and perhaps, at least as to intelligence and operational support, the proviso of the National Security Act of 1947 which provides that the Central Intelligence Agency (CIA) "shall have no policy, subpoena, law-enforcement powers, or internal security functions."^{11/}

b. Secret Service. The Secret Service would have authority concurrently with the FBI to investigate a terrorist kidnapping incident involving a Secret Service

^{10/} The Posse Comitatus Act, 18 U.S.C. §1385 (1976) provides that "[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the law shall be fined not more than \$10,000 or imprisoned not more than two years, or both." The Navy has imposed a similar restriction voluntarily on its own activities. Secretary of the Navy Instruction 5820.7. It could be argued that the kidnapping statute's assistance provision only authorizes Army and Air Force assistance which the Posse Comitatus Act does not forbid. However, such an interpretation would render surplus the specific reference to assistance from the Army, Navy, and Air Force notwithstanding other law, since the specific reference is already preceded by general authority to request assistance from any federal, state or local agency. The only apparent purpose Congress could have had in specifically referring to the armed forces in the provision was to override the Posse Comitatus Act prohibition. The only relevant legislative history states, in full:

Further, the legislation authorizes the Attorney General, in the course of enforcing the provisions of the statute relating to internationally protected persons, to request assistance from any federal, state, and local agency." H.R. Rep. No. 1614, 94th Cong., 2d Sess. 6 (1976).

^{11/} 50 U.S.C. §403(d)(3) (1976). While the CIA is not specifically mentioned in the kidnapping statutes assistance provision, as are the Army, Navy, and Air Force, the provision permits requests to "any Federal ... agency."

protectee.^{12/} The Secret Service would have available to it the services, equipment, and facilities of all executive departments and agencies, including CIA.^{13/} In addition, the Secret Service could assist the FBI in investigating a terrorist kidnapping incident involving a foreign official, guest, or internationally protected person.^{14/} Absent involvement of a Secret Service protectee or foreign official, guest, or internationally protected person, the Secret Service would have no investigative authority with respect to terrorist kidnapping incidents. The Secret Service would be generally available to assist the FBI in the execution of warrants and the exercise of arrest powers.^{15/}

c. Customs Service. The officers of the Customs Service have no independent investigative authority to exercise with respect to terrorist kidnapping incidents. As with other federal agencies, the Customs Service could assist the FBI in investigating a terrorist kidnapping incident involving a foreign official, guest, or internationally protected person.^{16/} The Customs Service would be generally available to assist the FBI in the execution of warrants.^{17/} Given the Customs Service's manpower located in U.S. ports of entry and exit, the availability of customs

^{12/} 18 U.S.C. §3056 (1976). Secret Service protectees include the President, Vice President, the President-elect, the Vice President-elect, major Presidential and Vice Presidential candidates, former Presidents, associated family members under certain circumstances, visiting chiefs of state and heads of government, and, at the President's direction, foreign visitors to the United States and United States representatives abroad.

^{13/} Presidential Protection Assistance Act of 1976, P.L. 94-524, §6, 18 U.S.C. §3056 note (1976).

^{14/} The federal kidnapping statute contains general authority for federal agencies to assist the FBI with kidnapping investigations involving these categories of persons. 18 U.S.C. §1201(f) (Supp. III 1979).

^{15/} 18 U.S.C. §3056 (1976).

^{16/} Supra, n. 13.

^{17/} 26 U.S.C. §7607(a) (1976).

officers to execute warrants might be of some assistance to the FBI in conducting an investigation of a terrorist kidnapping incident.

d. Border Patrol. The Border Patrol of the Department of Justice's Immigration and Naturalization Service has no independent investigative authority with respect to terrorist kidnapping incidents. As with other federal agencies, the Border Patrol could assist the FBI in investigating a terrorist kidnapping incident involving a foreign official, guest, or internationally protected person.^{18/} As with the Customs Service, the availability of Border Patrol officers at ports of entry and exit might prove useful to the FBI in the course of a terrorist kidnapping investigation. In addition, Border Patrol officers have two potentially useful statutory powers not enjoyed by FBI agents: (1) authority without warrant to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States, and (2) authority to board and search for aliens any vessel in territorial waters, or any railway car, conveyance, or vehicle, without warrant within a reasonable distance from any external boundary of the United States.^{19/}

e. Marshals Service. United States Marshals have no independent investigative authority with respect to terrorist kidnapping incidents. As with other federal agencies, the Marshals Service could assist the FBI in investigating a terrorist kidnapping incident involving a foreign official, guest, or internationally protected person.^{20/} United States Marshals would be generally available to assist the FBI in the execution of warrants^{21/} and the exercise of arrest powers.^{22/}

f. Other Law Enforcement Agencies. Several other federal law enforcement agencies have authority to provide

^{18/} Supra, n. 13.

^{19/} 8 U.S.C. §1357 (1976).

^{20/} Supra, n. 13.

^{21/} 28 U.S.C. §569 (1976).

^{22/} 18 U.S.C. §3053 (1976).

some measure of assistance to the FBI in investigating a terrorist kidnapping incident.^{23/} These agencies could, of course, assist the FBI in investigating a terrorist kidnapping incident involving a foreign official, guest, or internationally protected person.^{24/} The availability of the officers of these agencies to assist the FBI in executing warrants and exercising arrest powers varies. In addition to assistance from federal law enforcement agencies, the FBI could expect assistance from State and local law enforcement agencies in the locale of the terrorist kidnapping incident since kidnapping violates the laws of the several States.

5. Authority of Intelligence Agencies. The departments and agencies of the Intelligence Community have basic authority to collect, retain and disseminate information concerning a terrorist kidnapping incident within the United States and to assist law enforcement agencies in the investigation of such incidents. The intelligence agencies have authority to collect, retain and disseminate information which does not concern United States persons, and, to the extent collection, retention, and dissemination is pursuant to authority granted such agencies by statute or Executive order, information concerning United States persons which is "needed to protect the safety of any persons or organizations, including those who are targets, victims or

^{23/} At least 25 federal law enforcement agencies have authority to execute warrants and exercise arrest powers in various circumstances. See 28 CFR §60.3 (1980). Of the additional law enforcement agencies which have some authority to assist the FBI, probably only five have personnel sufficiently trained who could likely provide worthwhile assistance to the FBI: the Defense Investigative Service, the Army Criminal Investigation Command, the Naval Investigative Service, the Air Force Office of Special Investigations, and the Coast Guard.

^{24/} Supra, n. 13.

hostages of international terrorist organizations."^{25/} The intelligence agencies also have authority to provide specialized equipment, knowledge, and personnel to law enforcement agencies, and, unless otherwise precluded by law, to participate in law enforcement activities to investigate or prevent international terrorist activities and provide any other assistance to law enforcement agencies.^{26/} Several of the intelligence agencies are precluded by law from providing certain types of assistance to law enforcement agencies.

a. Special Restrictions on the Central Intelligence Agency. The National Security Act of 1947 specifically provides "[t]hat the Agency shall have no police, subpoena, law-enforcement powers, or internal security functions"^{27/} The Department of Justice has stated that "in the areas of international narcotics traffic, espionage, and terrorism, where law enforcement and foreign intelligence functions often merge almost into one," the law enforcement proviso should be interpreted in light of its underlying legislative purposes "to prevent the CIA from becoming a national secret police force and to protect the domestic

^{25/} Executive Order 12333, United States Intelligence Activities, §2.3(d) (4 Dec 81), 46 Fed. Reg. 59941 (1981). Agencies with counterintelligence responsibilities have authority to undertake such collection pursuant to applicable procedures when international terrorist activities are involved.

^{26/} Id., §2.6. The specific authority to participate in law enforcement activities to investigate or prevent international terrorist activities could potentially be construed to carry a negative implication that intelligence agencies are precluded from participating in law enforcement activities to investigate or prevent domestic terrorist activities, such as domestic terrorist kidnappings. However, this implication is substantially overcome by §2.6(d), which permits other assistance to law enforcement authorities not precluded by applicable law.

^{27/} National Security Act of 1947, §102(d)(3), 50 U.S.C. 403(d)(3) (1976).

jurisdiction of the FBI."^{28/} In the context of an FBI request for CIA assistance in locating U.S. person fugitives from justice abroad, the Department of Justice has stated that the legislative purpose of preventing CIA from becoming a national secret police force is satisfied if the CIA's law enforcement assistance activity takes place outside the United States, and that the legislative purpose of protecting the FBI's domestic jurisdiction is satisfied if the FBI requests the CIA assistance activity.^{29/} Accepting the Department of Justice interpretation of the law enforcement proviso of the National Security Act, it appears that the proviso would operate to bar the Central Intelligence Agency from participating within the United States in law enforcement activities to investigate a terrorist kidnapping incident. What constitutes "participation" and what constitutes "law enforcement activities" has not been resolved definitively. However, the more the proposed CIA activity within the United States involves the exercise of regulatory, proscriptive or compulsory power, the greater the likelihood that the activity constitutes forbidden participation in law enforcement activities.^{30/} Collection, retention and dissemination of foreign intelligence information, and provision of special equipment, technical knowledge, or expert personnel do not involve the exercise of regulatory, proscriptive or compulsory power and are clearly not prohibited participation in law enforcement activities. Thus, the CIA would be able to provide these services within the United States to the FBI in the course of the FBI's investigation of a terrorist kidnapping incident.

^{28/} Classified memorandum, dated 14 July 1976, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to Peter B. Bensinger, Administrator, Drug Enforcement Administration (quoted portions unclassified).

^{29/} Classified memorandum, dated 26 November 1980, from Kenneth C. Bass, III, Counsel for Intelligence Policy, to Daniel B. Silver, General Counsel, Central Intelligence Agency (referenced portions unclassified).

^{30/} The CIA participation might be permitted if the Attorney General requests assistance of CIA pursuant to 18 U.S.C. §1201(f) with respect to foreign officials, internationally protected persons, or official guests of the United States. See fn. 11, supra.

b. Special Restrictions on the Activities of the Intelligence Components of the Armed Forces. The federal criminal code provides that:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.^{31/}

This statute prohibits use of the intelligence components of the Army and the Air Force to execute the laws to the same extent that it prohibits use of the other components of the Army and the Air Force. The prohibition applies only to the exercise of regulatory, proscriptive or compulsory power by the personnel of the Army or Air Force^{32/} and not to assistance to law enforcement agencies which does not involve the exercise of such power, such as provision to law enforcement agencies of specialized equipment.^{33/} Moreover, Congress has recently provided express authority to the Secretary of Defense to allow the armed forces to assist law enforcement agencies by (1) disseminating information relevant to a violation of law obtained during the normal course of military operations, (2) making available equipment and facilities, (3) providing training in the use of equipment made available and expert advice, and (4) providing personnel to operate and maintain equipment made available solely for monitoring air and sea traffic.^{34/} In the exercise of this new authority the armed forces are prohibited from

^{31/} Posse Comitatus Act, 18 U.S.C. §1385 (1976).

^{32/} United States v. MacArthur, 419 F. Supp. 186 (D.N.D. 1976), aff'd sub nomine United States v. Casper, 541 F.2d 1275 (8th Cir. 1976).

^{33/} United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974).

^{34/} 10 U.S.C. §§371-374, enacted by Department of Defense Authorization Act, 1982, P.L. 97-86 (1 Dec 81).

direct participation in "an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation is otherwise authorized by law."^{35/} By the limitations of the Posse Comitatus Act and the limitations on the new authority of the Secretary of Defense to cooperate with law enforcement agencies, in response to a terrorist kidnapping incident within the United States the armed forces cannot participate directly in law enforcement activities involving authoritative acts, but otherwise may assist law enforcement agencies by providing information, advice, equipment, and training.

Given these special restrictions on the Central Intelligence Agency and the armed forces, care must be taken in responding to a terrorist incident in the United States that the personnel of the Central Intelligence Agency and members of the armed forces do not participate actively or directly in searches of persons, vehicles, or areas, roadblocks, arrests, and similar law enforcement activities involving the exercise of coercive powers.

III. TECHNIQUES AVAILABLE FOR USE IN RESPONSE TO A TERRORIST KIDNAPPING INCIDENT

6. Types of Techniques. Given that the FBI has authority to investigate a terrorist kidnapping incident within the United States, with some assistance from other law enforcement agencies, and that the intelligence agencies have limited authority to collect, retain and disseminate to law enforcement agencies information relating to the incident and to provide law enforcement agencies with equipment, training, advice, and other assistance not precluded by law, the success the law enforcement agencies have in responding to the incident depends upon the techniques they may lawfully employ. The techniques which may be available to law enforcement and intelligence agencies can be divided generally into two categories: nonintrusive techniques, with respect to which the subject of the techniques has no reasonable expectation of privacy; and intrusive techniques, with respect to which the subject of the techniques may have a reasonable expectation of privacy. Nonintrusive techniques generally include:

^{35/} 10 U.S.C. §375, enacted by Department of Defense Authorization Act, 1982. Such participation for terrorist kidnappings of foreign officials, foreign guests, and internationally protected persons would be authorized under 18 U.S.C. §1201(f) (Supp. III 1979).

a. examination of public records and other publicly available information;

b. examination of records of federal, state, local and foreign government agencies;

c. inquiries to federal, state, local and foreign government agencies;

d. interviewing people who may have relevant information; and

e. physical or photographic surveillance.

Intrusive techniques generally include:

a. mechanical monitoring;

b. mail openings;

c. physical search;

d. electronic surveillance; and

e. stops and arrests.^{36/}

7. Use of Nonintrusive Techniques. In response to a terrorist kidnapping in the United States, the FBI has authority to investigate using nonintrusive techniques. At the same time, the intelligence agencies may employ nonintrusive techniques,

^{36/} The use of the phrase "generally include" in cataloging the types of techniques reflects the ambiguity of dealing with a technique abstractly, outside a factual setting. For example, photographic surveillance is generally nonintrusive (e.g., photographing people who enter or leave a suburban home from a house across the street), but may be intrusive in given factual settings (e.g., photographing a person in his townhouse from an adjacent townhouse through a hole in a common wall). The touchstone in every case is whether the subject of the technique has a reasonable expectation of privacy and freedom from intrusion. Katz v. United States, 389 U.S. 347 (1967).

with limitations on the use of physical surveillance,^{37/} to collect information relating to an international terrorist incident, in accordance with the authorities and applicable procedures under Executive Order 12333. These agencies may coordinate the collection of information and share the information they collect.^{38/}

8. Use of Intrusive Techniques. The Constitution, federal statutes, federal rules of procedure, and an Executive order carefully circumscribe the ability of the law enforcement and intelligence agencies to employ intrusive techniques. These circumscriptions would have a direct impact on the ability of the United States Government to respond to a terrorist kidnapping incident within the United States.

a. Fourth Amendment. The fourth amendment to the Constitution of the United States provides:

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

Determining the applicability and effect of the fourth amendment with respect to a law enforcement or intelligence activity in response to a terrorist kidnapping incident depends upon whether the subject of the activity has a

^{37/} No intelligence agency other than the FBI can conduct physical surveillance of a U.S. person within the United States, except for physical surveillance of certain current or former intelligence-related personnel and current military personnel. Executive Order 12333, §2.4.

^{38/} Executive Order 12333, §2.6(a) (cooperation with law enforcement) and §2.3 (dissemination of information). That the intelligence agencies have legal authority to collect information in response to an international terrorist kidnapping in the United States does not necessarily indicate that they have existing effective capabilities, or that it is their policy, to do so.

reasonable expectation of privacy in the things into which the government seeks to intrude and whether the proposed intrusion is reasonable. If no reasonable expectation of privacy exists because members of the public can at will see or hear what the government seeks to see or hear, then the government may go forward since its activity does not implicate the fourth amendment.^{39/} Assuming that a reasonable expectation of privacy does exist, the fourth amendment requires that any government intrusion must be reasonable. To be reasonable, the intrusion must be conducted pursuant to a valid warrant or must occur in circumstances not requiring a warrant. A valid warrant issues upon sworn application describing particular seizable items and the particular place to be searched if a judicial officer finds probable cause to believe that the seizable items will be found at the place to be searched. Generally, no warrant is required for searches based on probable cause (1) incident to a lawful arrest,^{40/} (2) of movable vehicles,^{41/} (3) in emergencies such as hot pursuit of a criminal, destruction of evidence, or imminent danger to life or property,^{42/} (4) with consent,^{43/} (5) consisting of stops and frisks,^{44/} (6)

^{39/} Katz v. United States, 389 U.S. 347 (1967). Reasonable expectations of privacy arise from the concepts of property law and from understandings that society recognizes and permits concerning privacy. Rakas v. Illinois, 439 U.S. 128, 143-4, n. 12 (1978).

^{40/} Chimel v. California, 414 U.S. 260 (1973).

^{41/} Carroll v. United States, 267 U.S. 132 (1925); See Arkansas v. Sanders, 442 U.S. 753 (1979).

^{42/} Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Schmerber v. California, 384 U.S. 757 (1966); Cupp v. Murphy, 412 U.S. 291 (1973) (destruction of evidence); See United States v. Peterson, 522 F.2d 661 (D.C. Cir. 1975) (potential threat to life).

^{43/} A person who consents to a search has no reasonable expectation of privacy, and thus the fourth amendment restrictions are not applicable.

^{44/} Terry v. Ohio, 392 U.S. 1 (1968) (reasonable suspicion standard for stop and frisk, not probable cause).

of items in plain view,^{45/} (7) at international borders,^{46/} and (8) of foreign powers or their agents for foreign intelligence purposes.^{47/} The requirements of the fourth amendment will limit the ability of federal law enforcement and intelligence agencies to respond to terrorist kidnapping incidents.

b. Implications of Fourth Amendment Requirements in Terrorist Kidnapping Incidents. In responding to terrorist kidnapping incidents, the government must act with a maximum of dispatch, and often with a minimum of information. The passage of time may increase the danger to the victim and the potential value of the victim to the terrorists. However, obtaining warrants for intrusive techniques will often be difficult early in an investigation. To obtain a warrant, a law enforcement officer must demonstrate probable cause to believe that particular seizable items (terrorists, victim, evidence of the crime, instrumentalities or fruits of the crime, contraband) will be found in the particular place to be searched.^{48/} Particularized information of sufficient quality to support a probable cause determination to obtain a warrant may well be lacking until the investigation has been underway for some time. Intrusive techniques may be of greater value in circumstances that do not require warrants, which generally include searches (1) in emergencies, such as hot pursuit of criminals or life-

^{45/} Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrantless seizure of inadvertently discovered seizable item after prior valid intrusion).

^{46/} See Almeida-Sanchez v. United States, 413 U.S. 266 (1973). A person crossing an international border has no reasonable expectation of privacy.

^{47/} In foreign intelligence cases, Presidential or Attorney General approval substitutes for the judicial warrant. The validity of the foreign intelligence exception to the warrant requirement, recognized in United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980) and the cases cited therein, has not been tested before the Supreme Court. See note 54, infra.

^{48/} Fed. R. Crim. P. 41.

threatening danger,^{49/} (2) of movable vehicles,^{50/} (3) with consent,^{51/} (4) at international borders,^{52/} and, in

^{49/} The emergency hot pursuit exception would permit law enforcement personnel who happen fortuitously to be in the vicinity of a terrorist kidnapping to pursue the terrorists wherever they go. The emergency life-in-peril exception could be relied upon to proceed to rescue a victim once the victim is located.

^{50/} The movable vehicle exception would be available only if the automobile, watercraft, aircraft, or similar vehicle were capable of departing and there was probable cause to believe the vehicle contained the terrorists, victim, evidence of the crime, fruits or instrumentalities of the crime, or contraband. Although the Supreme Court has never explicitly approved the use of roadblocks near the scene of recent serious crimes, the Court has indicated that vehicle stops pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers would be upheld, and the commentators have indicated a belief that the Court would uphold roadblocks near the scene of a recent serious crime stopping all vehicles. LaFave, 3 Search and Seizure, §9.5 (1978); Ringel, 1 Searches and Seizures, Arrests and Confessions, §11.2(d) (1981). See Delaware v. Prouse, 440 U.S. 648, 663 (1979) (dictum suggesting approval of roadblock stopping all traffic). See also Brown v. Texas, 443 U.S. 47, 51 (1979).

^{51/} Door-to-door searches can be carried out consistent with the fourth amendment and the practical realities of law enforcement only on a consent basis. To the extent that information is obtained that terrorist kidnappers are located in a general area, consent door-to-door searches in that area would prove useful in narrowing the area requiring concentrated law enforcement attention. However, depending on any special or unique facts in a given case, such as the kidnapping of a visiting head of state of a potentially hostile power, it might be possible to lawfully conduct such searches under the emergency or exigent circumstances exception to the warrant requirement of the fourth amendment.

^{52/} Searches at international borders are generally conducted only of those who are entering the United States, not those who are departing. However, exit border searches of all departing persons, or of all persons meeting a specific terrorist profile might be upheld. Supra, n. 50.

particular, (5) for foreign intelligence purposes, but the requirement of probable cause in the latter category of cases may present difficulties, just as it may in circumstances requiring a judicial warrant.

c. Special Implications of Foreign Intelligence Exception to Fourth Amendment Warrant Requirement. With respect to the national defense and the conduct of foreign affairs, the executive branch has primary constitutional responsibility, special expertise, and a need for flexibility. To assure that the President can meet the needs of national defense and foreign policy, the courts have recognized a foreign intelligence exception to the fourth amendment warrant requirement with regard to the use of intrusive techniques directed at foreign powers or agents of foreign powers.^{53/}

The President has delegated to the Attorney General in Executive Order 12333 power to approve the use of intrusive techniques within the United States for foreign intelligence purposes upon determining that probable cause exists to believe that the target of the techniques is a foreign power or agent of a foreign power.^{54/} However, that electronic surveillance within the United States must be conducted in accordance with the Foreign Intelligence Surveillance Act of 1978^{55/} (discussed below). Consequently, the Presidential delegation of authority to the Attorney General serves as an independent authorization within the United States only for techniques which amount to a physical search. This authorization is further implemented and governed by classified directives and agency procedures under Executive Order 12333. Thus, the intelligence agencies may have greater flexibility in using intrusive techniques against foreign powers and their agents than law enforcement agencies have in using intrusive techniques against criminals. While law enforcement agencies, to use intrusive techniques, must have

^{53/} United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980); see United States v. Butenko, 494 F.2d 593 (3d Cir. 1973) (en banc); see also United States v. United States District Court, 407 U.S. 297, 308-9, 322 (1972) (raising in dictum possibility of a foreign intelligence exception).

^{54/} Executive Order 12333, §2.5.

^{55/} 50 U.S.C. §1801, et seq. (Supp. III 1979).

probable cause to believe that use of the technique will acquire particular seizable items or evidence in or from a particular place, intelligence agencies need only have probable cause to believe that the target of the intrusive technique is a foreign power or agent of a foreign power. The authority of the Attorney General to approve intrusive techniques directed at foreign powers and their agents for foreign intelligence purposes could prove useful in international terrorist kidnapping incidents within the United States.^{56/} Given the involvement of agents of foreign powers in international terrorist kidnapping incidents, greater use of intrusive techniques to collect information concerning such incidents could be made if the primary purpose for using the technique is for other than law enforcement purposes.^{57/}

d. Statutory Regime for the Conduct of Electronic Surveillance. Electronic surveillance within the United States must be conducted in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968^{58/} or the Foreign Intelligence Surveillance Act (FISA) of 1978.^{59/} Electronic surveillance under Title III requires a court order which issues only upon a determination that:

(1) probable cause exists to believe that the target of the surveillance has committed, is

^{56/} See paragraph 3, supra, on the distinction between domestic terrorist kidnapping incidents and international terrorist kidnapping incidents.

^{57/} Some authority exists for the proposition that foreign intelligence surveillance information gathered after the agents of foreign powers have become targets of criminal investigation may be inadmissible in subsequent criminal prosecutions. See United States v. Truong Dinh Hung; U.S. v. Butenko.

^{58/} 18 U.S.C. 2510, et seq. (1976).

^{59/} 50 U.S.C. 1801, et seq. (Supp. III 1979).

committing, or will soon commit a crime enumerated in Title III;^{60/}

(2) probable cause exists to believe that incriminating evidence will be intercepted;

(3) less intrusive investigative techniques will not succeed; and

(4) probable cause exists to believe that the site monitored is or will soon be used by the target, or is leased to, listed in the name of, or commonly used by the target.^{61/}

In contrast, electronic surveillance under FISA can be used only to acquire foreign intelligence information.^{62/} The Foreign Intelligence Surveillance Court created by FISA may issue an order approving electronic surveillance upon a determination, among other things, that:

(1) probable cause exists to believe that the target of the surveillance is a foreign power or an agent of a foreign power; and

^{60/} Kidnapping is an enumerated offense for the investigation of which Title III electronic surveillance may be authorized. 18 U.S.C. 2516(1)(b) (1976).

^{61/} 18 U.S.C. §2518 (1976). Title III permits interception in certain emergency circumstances with subsequent application for a court order. Id., §2518(7).

^{62/} Foreign intelligence information is broadly defined, and includes, among other things, "information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against ... sabotage or international terrorism by a foreign power or an agent of a foreign power." 50 U.S.C. §1801(e)(1)(B).

(2) probable cause exists to believe that the site monitored is, or is about to be, used by a foreign power or an agent of a foreign power.^{63/}

The less stringent FISA probable cause standard makes FISA preferable as the basis for electronic surveillance to collect information concerning a terrorist kidnapping incident within the United States. However, FISA will be available for that purpose only if the incident amounts to international terrorism rather than domestic terrorism.^{64/} In addition, unlike Title III, FISA does not require subsequent notification to the target of the surveillance that he was surveilled, unless the government intends to use information acquired under FISA against the target in a federal proceeding. Information acquired through a lawfully authorized and conducted FISA surveillance may be used in a subsequent criminal prosecution, subject to the rules of evidence.^{65/}

e. Special Restrictions on Physical Searches and Electronic Surveillance by Intelligence Agencies. Executive Order 12333 forbids the use within the United States by intelligence agencies of certain intrusive techniques which would be permissible under the fourth amendment and applicable federal statutes. Thus, CIA may not conduct electronic surveillance in the United States except for the purposes of training, testing, or conducting countermeasures to hostile electronic surveillance.^{66/} In addition, intelligence agencies other than the FBI are generally

^{63/} 50 U.S.C. §1805 (Supp. III 1979). FISA permits the Attorney General to authorize interception in certain emergency circumstances with subsequent application for a Foreign Intelligence Surveillance Court order. Id., §1805(e).

^{64/} See paragraph 3, supra, for the distinction between domestic and international terrorist kidnappings. Foreign intelligence does not include information about domestic kidnappings which do not amount to international terrorism as defined in FISA.

^{65/} 50 U.S.C. §1806 (Supp. III 1979).

^{66/} Executive Order 12333, §2.4(a).

prohibited from conducting unconsented physical searches within the United States.^{67/}

IV. CONCLUSION

9. Surveying the basic authorities of the various law enforcement and intelligence agencies to respond to a terrorist kidnapping incident within the United States reveals that they all have sufficiently broad charters to participate to some degree in an effective government response. Both the law enforcement and intelligence agencies have varying authority to employ nonintrusive techniques to collect information concerning terrorist kidnapping incidents. The restrictions on the use of intrusive techniques by intelligence agencies, which largely limit them to using such techniques only when specified standards of probable cause are met, could delay or hamper an effective response to both international and domestic terrorist kidnapping incidents. However, whether or not the probable cause requirements of Title III and FISA will, in fact, be an impediment in a given case depends upon the extent to which both law enforcement and intelligence agencies have developed sufficient preliminary information to meet those requirements. From a practical, as well as a legal, standpoint, the efficient and effective use of electronic surveillance, unconsented physical search, and other intrusive techniques, necessitates preliminary investigative efforts to narrow the field of potential targets. In any event, the existence of legal authority to conduct an effective response matters little if the law enforcement and intelligence agencies do not maintain capabilities to exercise their lawful authority and do not engage in joint planning to assure swift and effective cooperative action when a terrorist kidnapping incident occurs.

^{67/} Executive Order 12333, §2.4(b). Exceptions exist for military counterintelligence searches directed against military personnel for intelligence purposes if probable cause exists to believe they are agents of foreign powers and for CIA searches of the personal property of non-United States persons lawfully in its possession. Id.