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UNITED STATES GOVERNMENT

Memorandum

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TO : Mr. Mohr

DATE: May 10, 1968

FROM : J. J. Casper

JUNE

SUBJECT: MURKIN

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 3-14-86 BY [signature]

As shown in attached memorandum of May 9, 1968, from Mr. Rosen to Mr. DeLoach, consideration is given to microphone installations on certain properties of Albert and Carol Pepper. The proposal raises a question concerning the legality of any action taken against the subject of this case on th basis of information obtained from the microphones.

We believe these microphones can be installed and used without prejudicing the case against the subject. In a very recent decision of the Unite States District Court for the Southern District of New York, a listening device was installed on the premises of one Levine. Later, a subject named Granello an associate of Levine, came up for trial and claimed that the listening device installed on Levine's premises, which was installed by trespass, was illegal as to him, Granello. It was not contended that any information obtained from the Levine microphone was used as evidence against Granello at trial either direct or as a lead. The court held that since Granello had no interest in the Levine premises, the monitor was not illegal as to him and he could not obtain a new trial or dismissal of the indictment. U.S. v. Granello, 280 F. Supp. 482 (196

Applied to instant case, this rule of law could work out in differ ways. Assuming that the subject of this case is not on the premises to be surveilled by the means suggested, and has no possessory or other right in those premises, any information disclosed by the surveillance in some way, such as conversation among the Peppers, could be used to learn the whereabou of the subject for purposes of arrest. The problem becomes somewhat more complicated, however, if the subject of this case made a telephone call to thos premises and that telephone call were recorded and used as the basis for his apprehension. He then could claim that the surveillance violated his right of privacy in the telephone communication he made to that place, citing the Katz decision in the Supreme Court.

REC 11 44-38861-3

Enclosure ~~[illegible]~~
1 - ~~[illegible]~~
1 - Mr. DeLoach
1 - Mr. Conrad
1 - Mr. Gale
1 - Mr. Rosen
1 - Mr. Malley
1 - Mr. McGowan
1 - Mr. Long
DJD/pal
(10)

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Memorandum J. J. Casper to Mr. Mohr
RE: MARKIN

The worst that could happen in either of the above circumstances, however, - assuming that we follow the precautionary measures listed below - is that we illegally learn where the subject is located and thus are able to arrest him on that knowledge. The rule that comes into play here, established in the last century by the Supreme Court in Ker v. Illinois, 30 U.S. 347 (1886), is that an illegal arrest is no bar to prosecution. Wong Sun v. U.S., 371 U.S. 471 (196: U.S. v. Hoffman, 385 F2d 501 (1967); Keegan v. U.S., 385 F2d 260 (1967). A person may be arrested unlawfully and actually kidnapped into the court having jurisdiction of the criminal case, yet the court still retains jurisdiction to try the person for the offense. The court would not allow the prosecution to use as evidence any information obtained through the illegal surveillance but the illegal surveillance would not taint the use of any other evidence obtained either before or after and which was gotten in a legal manner. Nor, to repeat, would the illegality of the arrest alone, resulting from whereabouts disclosed by unlawf surveillance, prevent the court from trying the subject for the offense.

If the action being considered is taken, we strongly suggest three precautionary measure s, as follows:

(1) That all recordings be preserved intact. It may be necessary to disclose some of them to the court or even to the defense.

(2) That no use be made of any information obtained against anyone whatsoever or in any way whatsoever except for the single purpose of locating the subject in this case. As we well know by this time, evidence of the offense obtained in this manner is not admissible. It would not be admissible against the subject and it would not be admissible against the Peppers on a charg of harboring.

(3) Be aware that since this search and seizure is unconstitutiona as to the Peppers, they have at least a theoretical cause of action for damages against those who installed the devices by trespass. Here again, however, if nothing learned by this surveillance is used against the Peppers in any way, thei cause of action is diminished to the lowest possible degree, becoming that for a technical violation only rather than one of substantial harm to them. Moreover, in any such case the government of the United States should surely be willing to pick up the tab for any judgment had against those who installed the microphones.

RECOMMENDATION:

For information.