UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD A. HORN,

Plaintiff,

v.

FRANKLIN HUDDLE, JR. et al.,

Defendants.

Civil Action No. 94-1756 (HHG)

FILED UNDER SEAL

OPINION

The issue before the Court is whether the plaintiff, an American official, may pursue an action for surreptitious wiretapping by employees of the Central Intelligence Agency and the State Department. Defendants have filed a motion to dismiss or, alternatively, for summary judgment.

I

Factual Background

This case arises out of events that took place at the United States Embassy in Rangoon, Burma between June 1992 and September

1993.[1] The following is a summary of the facts.[2]

Richard Horn, a Special Agent with the Drug Enforcement Administration (DEA), served as the DEA country attache to Burma. The defendants are Franklin Huddle, Jr., a State Department employee and Chief of Mission of the Embassy, and Arthur Brown, a Central Intelligence Agency employee who was the First Secretary and then the Counselor of Embassy for Regional Affairs. Horn asserts that the DEA mission of working with the government of Burma to combat the flow of heroin and opium from Burma was being undermined by actions of personnel from the State Department and the CIA, who were unwilling to credit the government of Burma with success in its anti-drug efforts. Horn was removed from his post in Rangoon in September 1993, allegedly in retaliation for speaking out against CIA and State Department policy.

The central disputed fact is whether Huddle, Brown, or any other United States officials conducted an electronic surveillance of the plaintiff. Horn alleges that defendants wiretapped his communications without his permission, and

---

[1] Burma has been called Myanmar since 1989; however, the parties have used the name Burma and the Court will do likewise.

[2] As this is defendants' motion, the facts are viewed in the light most favorable to the plaintiff.

disclosed the contents of these communications to State Department and CIA officials in Burma and in Washington, D.C. Horn believes that this wiretapping was accomplished by the CIA through an eavesdropping device placed in his coffee table. Horn's coffee table had been replaced in November 1992 without his authorization, a fact that did not seem significant to him until he learned from [redacted] one Marlow Strand, that the CIA [redacted] Defendants Huddle and Brown, in addition to Hugh Price, Deputy Director of Operations for the CIA, deny that such electronic surveillance occurred.

One particular instance of alleged wiretapping, on August 12, 1993, was of a conversation between Horn and Special Agent David B. Sikorra, about Horn's forced removal from Rangoon. At the time of the conversation, Horn and Sikorra were each at home in their government leased quarters in Rangoon. Partial contents of this conversation, held late one night, were disclosed the very next day in a cable from defendant Huddle to other State Department officials in Washington, D.C. As discovery has been stayed in this case pending resolution of the summary judgment motion, Horn has been precluded from deposing the government

officials with information supporting his allegations, and Horn does not have a copy of this cable. However, defendants voluntarily submitted the cable to the Court, the Court has examined it in camera, and verified that indeed, it is a verbatim reproduction of parts of Horn's conversation with Sikorra, using quotation marks and ellipses, and a paraphrasing of other parts--evidence that Horn's conversation had been wiretapped.

In his complaint, plaintiff asserts a Bivens claim against Huddle and Brown for violating his Fourth Amendment rights, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and he also claims a violation of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1810, and of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510. In their motion, defendants argue that plaintiff has not stated a claim under the Constitution, the FISA or Title III. They also argue that they are entitled to qualified immunity.

II

Statutory Claims

Summary judgment may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp.

v. Catrett, 477 U.S. 317, 321-23 (1986). Defendants argue that they are entitled to summary judgment both on plaintiff's statutory claims and on the Bivens claim on the basis that none of the claims may be advanced for acts occurring outside the United States. The Court concludes that defendants' arguments on the statutory claims are well taken, but that the Bivens claim should be allowed to go forward.

It is presumed that a statute applies only within the United States unless there is strong evidence to the contrary. Smith v. United States, 507 U.S. 197, 204 (1993); EEOC v. Arabian American Oil Co. (Aramco), 499 U.S. 244, 248 (1993) ("[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality"). Plaintiff attempts to diminish the force of Smith and Aramco on the theory that these decisions do not specifically address FISA or Title III. The Court rejects this argument. In each of these cases, the Supreme Court's analysis begins with the general proposition against extraterritorial application and then focuses on the particular statute at issue--the Federal Tort Claims Act in Smith and Title VII of the Civil Rights Act of 1964 in Aramco.

Plaintiff argues, without citing to any cases that directly support this proposition, that American embassies and government-

leased housing abroad are areas "under the territorial sovereignty of the United States" to which FISA is applicable.[3] 50 U.S.C. § 1801(j). This argument also lacks merit. In order for FISA to be construed to apply extraterritorially to United States embassies abroad, Congress must have expressed its intention to that effect clearly. But there is no evidence in the language of the statute or its legislative history that this statute should apply abroad.

The text of FISA indicates that the Act was not intended to apply outside the United States. The Act defines "electronic surveillance" as "the acquisition . . . of any wire or radio communication sent by . . . a . . . person who is in the United States" or "if such acquisition occurs in the United States." 50 U.S.C. § 1801(f). The legislative history of the statute confirms that Congress did not intend the Act to apply extraterritorially. Indeed the Senate Report expressly states that the Act "does not deal with . . . electronic surveillance conducted outside the United States." S.Rep. No. 701, 95th Cong.,

---

[3] Although a United States embassy abroad is inviolable, it is nevertheless considered under American law to be situated in foreign, not United States territory. Fatemi v. United States, 192 A.2d 525, 527 (D.C. 1963); J.L. Brierly, The Law of Nations, 260-61 (6th ed. 1963).

2d Sess. 7 n.2. The Senate Report goes on to state that the Act specifically excludes "U.S. Embassies, military bases, and other installations abroad." S. Rep. No. 701, 95th Cong., 2d Sess. 47 (1978).

Similarly, every court which has addressed the issue has concluded that Title III of the Omnibus Crime Control and Safe Streets Act is inapplicable to electronic surveillance abroad. See, e.g., United States v. Barona, 56 F.3d 1087 (9th Cir. 1995), cert. denied, 116 S.Ct. 813 (1996); Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978), cert. denied, 442 U.S. 931 (1979); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 157 n.6 (D.D.C. 1976). In United States v. Controni, 527 F.2d 708, 711 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976), the Court of Appeals for the Second Circuit rejected the argument that disclosure in the United States of communications intercepted abroad triggered its provisions: "[I]t is not the route followed by foreign communications which determines the application of Title III; it is where the interception took place." The Second Circuit also noted that Title III "significantly makes no provision for obtaining authorization for a wiretap in a foreign country." United States v. Toscanino, 500 F.2d 267, 279-80 (2d Cir. 1974).

Plaintiff argues that his case is distinguishable from all

of those cited above because the alleged eavesdropping occurred within an American embassy and government leased housing abroad--which, argues plaintiff, are "possessions" of the United States, to which Title III is applicable. 18 U.S.C. § 2511. But in a similar case of alleged wiretapping of an American citizen by American government officials at an American government facility abroad--a United States Air Force base in England--Title III was held inapplicable by the Court of Military Appeals. United States v. Parrillo, 34 M.J. 112, 118 (C.M.A. 1992). Furthermore, as noted above, a United States embassy is considered under United States law to be in foreign, not United States territory.

In view of the lack of evidence that Congress intended either the FISA or Title III to apply extraterritorially--indeed of evidence that strongly supports the opposite conclusion--the Court concludes that neither statute is applicable to this case. Accordingly, Counts Two and Three of the complaint are dismissed for failure to state a claim upon which relief can be granted.

III

Bivens Claim

In regard to the Bivens claim, defendants have raised the defense of qualified immunity. As the Supreme Court has held, the basic framework of qualified immunity is that "government

officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Harlow decision rested on a balancing of two conflicting values inherent in the resolution of any immunity question: vindicating constitutional rights at the same time as minimizing the costs--to the defendant officials and society as a whole--of insubstantial claims; "[t]hese social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." Id. at 814.

In order to carry out the Supreme Court's mandate that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," id. at 817-18, a "heightened pleading" requirement has evolved.

The most recent standard in the Court of Appeals for this Circuit was announced in Crawford-El v. Britton, 93 F.3d 813, 825 (D.C. Cir. 1996)(en banc), which rejects the "heightened pleading" requirement in favor of a heightened standard of proof.

Leonard Rollon Crawford-El, a prisoner in the District of Columbia's correctional system, filed a 42 U.S.C. § 1983 suit against a D.C. corrections official for allegedly misdelivering boxes belonging to him of legal papers, clothes, and other personal items, thereby violating his constitutional right of access to the courts. The District Court denied defendant's motion for summary judgment resting on the defense of qualified immunity. The original panel of the Court of Appeals reviewed Crawford-El's allegations under a "heightened pleading" requirement that the plaintiff advance "nonconclusory allegations that are sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response." Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C. Cir. 1991). The panel found that plaintiff had not met this standard, but remanded the case to the District Court to permit repleading because of changes in the heightened pleading doctrine since his original pleading. On remand, the District Court again dismissed plaintiff's claims, ruling that the complaint did not allege "direct" evidence of unconstitutional motive, as distinguished from circumstantial evidence. Crawford-El v. Britton, 844 F.Supp. 795, 802 (D.D.C. 1994) (citing Siegert v. Gilley, 895 F.2d 797, 800-02 (D.C. Cir. 1990)); see also Kimberlin v.

Quinlan, 774 F.Supp. 1 (D.D.C. 1991), rev'd, 6 F.3d. 789 (D.C. Cir. 1993), rev'd on other grounds, 115 S.Ct. 2552 (1995).

Upon rehearing en banc, the Court of Appeals explicitly overruled the Siegert line of cases which distinguished between direct and circumstantial evidence of unconstitutional motive. In its place, the en banc court established "the straightforward rule that plaintiff cannot defeat a summary judgment motion unless, prior to discovery, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive." Crawford-El, 93 F.3d at 819 (citing Siegert, 500 U.S. at 236 (Kennedy, J.) (concurring opinion)). Further to protect defendant officials, the court adopted a heightened standard of proof--clear and convincing evidence--to apply both at summary judgment and at trial. Id. at 823.[4]

Following Crawford-El's dictates on applying Harlow, this Court first turns to the question of whether Horn's allegations

---

[4] The Court of Appeals offered the following guidance as to how a case would proceed in District Court: "Once the plaintiff has come forward with evidence that a jury could regard as clear and convincing proof of the defendant's unconstitutional motive, his access to discovery on all issues (including motive) would be, in the view of the judges in the plurality, a matter for the district court to determine as in ordinary civil litigation." Id. at 823 n.8.

could constitute a violation of clearly established law.[5] Id. at 825. Plaintiff argues that Executive Order No. 12,333, reprinted in 50 U.S.C. § 401 (1992), is clearly established law violated by defendants. This Executive Order, which explicitly applies to surveillance of "United States persons abroad," id., requires federal officials to obtain approval from the Attorney General before conducting electronic surveillance. However, Executive Orders generally do not confer a private right of action to enforce obligations imposed on Executive Branch officials by such orders. In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1357 (D.C. Cir. 1980). Moreover, Executive Order No. 12,333 expressly provides that it is not intended "to confer any substantive or procedural right or privilege." Exec. Order N. 12,333 § 3.5, reprinted in 50 U.S.C. § 401.

In the absence of rights stemming from the Executive Order, the crucial question here is whether the Constitution itself is violated by American officials who wiretap American citizens on foreign soil, and whether the right not to be subjected to such

---

[5] As noted above, because no court has held that either FISA or Title III applies extraterritorially to an American embassy or government leased housing, the plaintiff cannot demonstrate that the law was clearly established that those statutes would apply to the immediate fact situation.

wiretaps is clearly established law.

More than forty years ago, the Supreme Court "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of the Rights." Reid v. Covert, 354 U.S. 1, 5 (1956) (plurality op.). Reid held that the Fifth and Sixth Amendments apply extraterritorially to protect the wives of American servicemen tried by military tribunals and United States citizens accompanying the armed forces in foreign countries. See also Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960). The Court grounded its decision in the principle that:

> The United States . . . can only act in accordance with all the limitations imposed by the Constitution. When the government [acts against] . . . a citizen abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Reid, 354 U.S. at 5-6.

In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Supreme Court further clarified the Reid holding. After arresting Rene Martin Verdugo-Urquidez, a citizen of Mexico, on narcotics-trafficking charges, United States Drug Enforcement Agents executed searches of Verdugo-Urquidez's residences in Mexico with the authorization of the Mexican authorities, but

without having obtained an American search warrant. Verdugo-Urquidez then moved to suppress evidence seized during the searches on the ground that the DEA agents violated his Fourth Amendment rights in failing to justify the search of his premises without a warrant.

Verdugo-Urquidez argued that the Court should interpret Reid "to mean that federal officials are constrained by the Fourth Amendment wherever and against whomever they act." Id. at 270. The Supreme Court rejected this argument stating that "the holding of Reid stands for no such sweeping proposition: it decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments." Id. (emphasis added). The sole question presented in Verdugo-Urquidez was "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." Id. at 261.[6]

---

[6] The Supreme Court based its distinction between the rights of citizens and non-citizens on the text of the Constitution and historical evidence. The Constitution itself differentiates between "the people" and "the accused." The Fourth Amendment, along with the First, Second, Ninth, and Tenth, refers to rights of "the people," suggesting that those amendments protect "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." Id. at 265. Furthermore, historical evidence shows that "the purpose of the Fourth

The Court ruled that it does not apply.[7]

Several lower courts have held that the Fourth Amendment applies to protect United States citizens from unreasonable conduct of United States government agents abroad. See, e.g., United States v. Behety, 32 F.3d 503, 510-11 (11th Cir. 1994). This Amendment does not apply to a foreign search of American citizens only when the United States is not involved in the search, Stonehill v. United States, 405 F.2d 738, 753 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969); it most certainly applies to suppress evidence obtained through a foreign search of an American citizen by United States officials. United States v. Mount, 757 F.2d 1315, 1317-18 (D.C. Cir. 1985). And in a

---

Amendment was to protect the people of the United States against arbitrary action by their own Government." Id. at 266.

[7] Justices Brennan and Marshall dissented on the ground that the Constitution applies to acts of the government toward both citizens and non-citizens abroad, but noted that "nothing in the Court's opinion questions the validity of the rule, accepted by every Court of Appeals to have considered the question, that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad." Id. at 283 n.7 (dissenting op.) (citing United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir.), cert. denied, 444 U.S. 831 (1979) (Fourth Amendment applies to Coast Guard search of an American vessel in Haitian waters); United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978) (Fourth Amendment applies to search of American citizen by United States customs officers in foreign airport)).

directly factually analogous precedent, this Court has ruled that the Fourth Amendment applies to, and requires judicial approval of, a foreign wiretap of non-military United States citizens instituted by the United States Army in Germany. Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144, 156-57 (D.D.C. 1976).

In short, the CIA and the Department of State are not free to operate outside of the limits of the Constitution, including the Fourth Amendment, against a fellow American citizen. Thirty years ago, the Supreme Court determined that the Fourth Amendment governs wiretap surveillance and implemented a warrant requirement to protect against unreasonable searches: the government must show a particularized purpose relating to a specific criminal offense in order to obtain authorization from a magistrate. Berger v. New York, 388 U.S. 41, 50-53 (1967); Katz v. United States, 389 U.S. 347, 352-53 (1967).

In light of these precedents, the Court holds that the Fourth Amendment's extraterritorial application to conduct of American officials toward American citizens abroad is not merely "clearly foreshadowed" by prior caselaw, Zweibon v. Mitchell, 720 F.2d 162, 172 (D.C. Cir. 1983), but is "settled, indisputable law." Wood v. Strickland, 420 U.S. 308, 321 (1975).

The law is considered "settled" where "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The purpose of the "clearly established law" requirement is a simple one: to protect federal officials from liability for actions they did not "know" to be prohibited by the law. In this case, the defendants cannot fairly claim that they did not "know" that the Fourth Amendment applied to electronic surveillance of an American citizen abroad; so to conclude would not only ignore the numerous precedents outlined above, but one would also have to assume, contrary to common sense, that agents of the CIA do not know that the tapping of the telephone of an employee of another American governmental agency stationed in the same capital abroad is not permitted. For the reasons stated, the Court finds no basis for the assertion that it is not clearly established law that a search or wiretap of an American citizen by American officials abroad must meet the Fourth Amendment requirement of a warrant or probable cause.

Upon concluding that Horn's allegations could constitute a violation of a clearly established constitutional right, the Court next turns to the question of whether a jury could

reasonably find clear and convincing evidence of defendants' unconstitutional motive. Crawford-El v. Britton, 93 F.3d at 823. The complaint alleges a specific violation of plaintiff's Fourth Amendment rights by defendants' warrantless electronic surveillance, and this claim is clearly supported by the State Department cable's verbatim transcription of Horn's telephone conversation on August 12, 1993 with his subordinate, DEA Special Agent Sikorra. Although plaintiff has evidence of only one particular interception, it is unlikely that Brown and Huddle would intercept one phone call from plaintiff's residence and not any of plaintiff's other conversations.[8]

One purpose of the heightened pleading standard in Bivens suits is to prevent the scenario in which "[u]nsupported factual allegations . . . fail to specify in detail the factual basis necessary to enable [defendants] to intelligently prepare their defense." Martin v. Malhoyt, 830 F.2d 237, 258 (D.C.Cir. 1987). The allegations in Horn's complaint detail when, where, how, and by whom the alleged wire-tapping occurred, and they readily

---

[8] Plaintiff has not yet had the benefit of discovery, which was stayed pending the resolution of the motion for summary judgment. See Crawford-El, 93 F.3d at 819. As stated above, the cable of August 12, 1993, was inspected by the Court, in camera, pursuant to an offer by the defendants to produce this document for the Court's inspection.

provide the defendants with the means to counter the allegations.

Therefore, defendants' motion to dismiss or for summary judgment on the Bivens claim will be denied, and the motion on the statutory claims will be granted.

HAROLD H. GREENE
United States District Judge