MAY 11 1977

REPORT TO THE SPECIAL COORDINATION COMMITTEE

Re: Foreign Intelligence Electronic Surveillance Legislation. (U)

(U) The following report is submitted to the SCC pursuant to PRM/NSC-11 by the SCC subcommittee acting under the direction of the Attorney General.*/ This report is made separate from the other reports under PRM/NSC-11 because of pressure from Congress for the Administration to introduce legislation regarding foreign intelligence electronic surveillance promptly, if it does not want to be faced with bills introduced unilaterally by various members of Congress. To facilitate a rapid response to Congress, the Department of Justice has completed an initial draft bill which has been circulated to CIA, DOD, NSA, NSC, OMB, and the Department of State. Upon concurrence of these departments and agencies and the approval of the SCC of this report, and after consultation with the members of Congress most interested in sponsoring such legislation, the Department of Justice will have the legislation introduced. The subcommittee requests that in light of the time considerations the SCC address this report as soon as possible.

Background:

(U) In the last Congress, the Administration proposed legislation to provide for the issuance of judicial warrants

*/ The subcommittee consists of John Harmon, Chairman, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice; Herbert Hansell, Legal Adviser, Department of State; L. Niederlehner, Acting General Counsel, Department of Defense; Anthony Lapham, General Counsel, Central Intelligence Agency; W. Bowman Cutter, Executive Associate Director for Budget, Office of Management and Budget; and as observers, Samuel Hoskinson, NSC Staff; James Hudec, Assistant General Counsel, National Security Agency. The views and recommendations herein are those of the subcommittee's members.

authorizing electronic surveillance for foreign intelligence purposes within the United States. It was introduced in the Senate by Senator Kennedy as S. 3197 and in the House by Congressman Rodino as H.R. 12750. The bill, with amendments, was reported favorably to the Senate by both the Judiciary Committee (11-1 vote) and the Intelligence Committee (14-1 vote). Despite the overwhelming votes in support of the bill, the Senate did not act because the imminence of adjournment provided a reason for deferring action on the bill, several provisions of which had generated considerable controversy. In the House the bill was not brought to a vote by the Judiciary Committee, which was awaiting Senate action.

(U) Senator Kennedy, among others, has indicated his desire to reintroduce the bill as it was reported to the Senate by the Intelligence Committee, but he has agreed to delay introducing it for a brief period to allow the new Administration to familiarize itself with the bill and make any suggested changes before introduction.

(U) It is the subcommittee's view, therefore, that the Executive has no viable option other than to draft a bill for introduction, because otherwise the Executive will be forced to react to and to attempt to make changes to a Senate, if not House, initiated bill. Moreover, members of Congress have indicated to the Justice Department that they are becoming impatient, and they are continuing to hold off introducing their legislation only upon the Justice Department's representation that an Executive Branch proposal will be forthcoming imminently.

Synopsis of S. 3197.

(U) As reported by the Senate Intelligence Committee, S.3197 provided for the designation by the Chief Justice of seven district court judges, to whom the Attorney General, if he is authorized by the President to do so, could apply for an order approving electronic surveillance within the United States for foreign intelligence purposes. The legislation committed to the judge the decision whether there was probable cause to believe that the target of the surveillance was a foreign power or an agent of a foreign power but reserved to the Executive Branch the decision whether the information sought was of a certain value to the national security. Specifically, before issuing a warrant, a judge would have to find that (a) there is probable cause to believe that the target of the surveillance is a foreign power or foreign agent; (b) minimization procedures to limit acquisition and dissemination are reasonable; and (c) a Presidential appointee confirmed by the Senate or the Assistant to the President for National Security Affairs has certified that the information sought is foreign intelligence information that cannot feasibly be obtained by less intrusive techniques. Such surveillances could not continue longer than 90 days without securing renewed approval from the court. An emergency provision was included

in the bill to allow the Attorney General to authorize a surveillance without a warrant in situations where there was not enough time to prepare the necessary papers for the court's review. In such circumstances the Attorney General could authorize the use of electronic surveillance for a period of no more than 24 hours and he was required to notify a judge at the time of the authorization that he had approved such an emergency surveillance and to submit an application to the judge within 24 hours. Finally, the legislation required the Attorney General to report annually both to the Congress and the Administrative Office of the United States Courts statistics on electronic surveillance approved pursuant to the bill's procedures.

~~(S-HVCCO)~~ The definitions in the bill were critical because they defined its scope. It was the definition of electronic surveillance that required a warrant for all electronic surveillance within the United States. There were three elements to the definition. First, the bill covered all wiretaps placed within the United States on communication lines regardless of the location of the sender or receiver. This included all telephone and telegram traffic travelling by wire as well as NSA's coverage of telex traffic of foreign governments.

Second, all radio transmissions, such as long distance telephone calls carried by microwave, between points within the United States, were covered. By its terms, this element of the definition did not cover NSA's radio interception of foreign communications carried by international common carriers when at least one terminal was outside the United States. Finally, the bill established a procedure for seeking a judicial warrant authorizing the use of an electronic, mechanical, or other device, such as a microphone, to acquire information under circumstances in which a warrant would be required in a criminal case.

(U) The definition of "agent of a foreign power" was also critical because it defined those individuals whose communications could be intercepted. As reported by the Senate Intelligence Committee, an "agent of a foreign power" was one who (1) is not a citizen or permanent resident alien of the United States and is an officer or employee of a foreign power, (2) is engaged in terrorist, sabotage, or clandestine intelligence activities in violation of law for or on behalf of a foreign power, or (3) acts pursuant to the direction of a foreign intelligence service and knowingly transmits information or material to such service in a clandestine manner which would lead a reasonable man to believe that the disclosure of the

information or material would harm the security of the United States or that the Government's lack of knowledge of such transmission would harm the security of the United States.

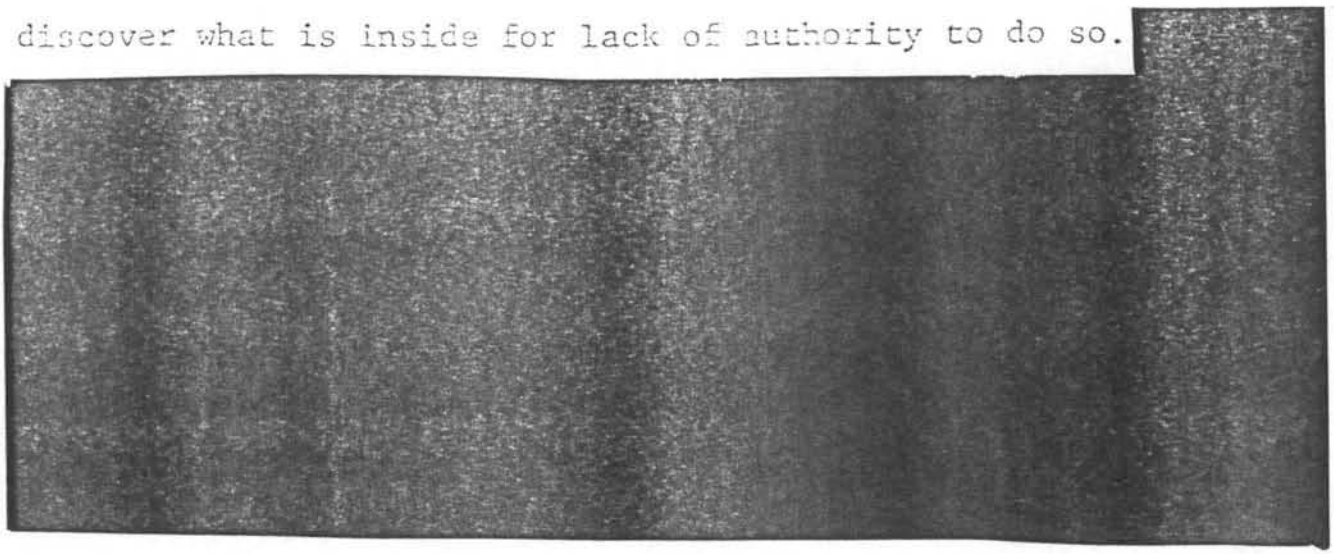
(U) It is the subcommittee's view that an Executive proposal should utilize the basic structure of S. 3197. With certain changes S. 3197 can be supported by the Intelligence Community and the Department of Justice; it has a proven track record in the Senate where it was overwhelmingly endorsed by votes of 11-1 and 14-1 in the Judiciary and Intelligence committees respectively. Some of the changes suggested, infra, will meet some of the criticisms of S. 3197, and the most vocal opposition to S. 3197 cannot be avoided no matter what form a bill acceptable to the Executive takes.

(U) With this introduction the subcommittee believes there are seven major policy issues that should be addressed by the SCC involving possible changes to S. 3197.

I. Physical Searches. (U)

(S) The Issue: At the present time, the Attorney General is not authorizing physical searches in the United States for foreign intelligence purposes for lack of authority to do so. While it has been the Department of Justice's position in the past that the President may authorize foreign intelligence physical searches without a warrant on the same basis as he can authorize warrantless electronic surveillance, the President has never delegated to the Attorney General the authority to approve such searches, as has been done in the field of electronic surveillance.

(S) The lack of any authority for physical searches at this time is considered critical both by the CIA and the FBI. Opportunities to collect legitimate foreign intelligence information have been lost because of an absence of a delegation of constitutional authority or of legislative authority. For example, the FBI has some sources who have legitimate access to the outside of containers (e.g., desks, boxes, envelopes, car trunks, etc.) but who cannot open that container to discover what is inside for lack of authority to do so.



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(U) Options: While there are several options available to cure this problem, which will be the subject of a separate report from this subcommittee, at this time the options are essentially two:

(S) (a) Draft a separate title to the electronic surveillance bill to cover physical searches. This option would "legitimize" the activity and offer the assurance that any search, whether physical or electronic, could only be conducted pursuant to a judicial warrant. While tying a physical search title to an electronic surveillance title would probably increase the likelihood of obtaining legislation on searches, it would definitely slow, and perhaps jeopardize, passage of the electronic surveillance bill. Moreover, the drafting of physical search provisions would be extremely difficult. S. 3197, the prior Administration's bill, did not address this problem. Although a two-title bill can be supported on the basis that it brings all kinds of searches into its protective ambit, it will also be criticized, unfairly to be sure, on the same basis: it approves a kind of search, the authorization for which has not been sought in the past from either the President or the Congress. In any case, it will not solve

the short term problem of authorization for physical searches, because ultimate passage of even a bill limited only to electronic surveillance is not expected before mid-1978.

(S) (b) Not include physical searches in the electronic surveillance bill. Under this option the electronic surveillance bill would not be delayed or jeopardized. Authorization for physical searches absent legislation could be undertaken pursuant to Presidential authorization, if the Attorney General reconfirms the Justice Department's previous position on the President's authority, and/or pursuant to ad hoc judicial warrants. CIA prefers the former because of the lack of certainty as to security procedures if ad hoc warrants were to be obtained. CIA is also of the view that if the Attorney General decides the President cannot constitutionally authorize physical searches of foreign agents and foreign powers or if the President decides that as a policy matter he does not choose to exercise the authority, then a physical search bill should be submitted to Congress immediately, preferably as an amendment to the electronic surveillance bill. Such an amendment could be suggested after the electronic surveillance bill was introduced. Finally, not including physical searches in the electronic surveillance bill should not be

considered a decision not to seek legislation on the issue at a later time. (A fuller discussion on this problem and options for dealing with it shall be the subject of a later report of this subcommittee.)

Recommendation: Option (b).

II. Geographic Scope of bill. (U)

(S) The Issue: S. 3197 was all-inclusive as to the coverage of electronic surveillance (including NSA) within the United States, but did not affect electronic surveillance abroad. Currently, United States persons (i.e., citizens and permanent resident aliens) may be targeted overseas as subjects of electronic surveillance by U.S. intelligence agencies only with the approval of the Attorney General.*/ Typically, electronic surveillance abroad has been conducted either by or with the cooperation of the intelligence agencies or police services of the foreign government. To our knowledge, no U.S. person has been the target of an unconsented electronic surveillance overseas for foreign intelligence purposes since at least the effective date of Executive Order 11905. (The incidental interception of communications of U.S. persons is

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*/ (S) Whether the Attorney General may approve such surveillances for lack of a Presidential authorization is currently under study by the Department of Justice.

a more complex problem, which under the various procedures of the Attorney General is still being worked out.)

(U) Options: There are basically three options. (These options refer primarily to CIA electronic surveillance abroad; NSA's activities are discussed under the next issue.)

(S) (a) Expand the electronic surveillance bill to preclude a federal agency from targeting, or cooperating with a foreign government in targeting, a United States person abroad without a judicial warrant. This option would provide statutory authorization for such targeting and ensure that U.S. persons would be protected by the judicial warrant procedure. However, in light of the fact that the surveillance is normally conducted by the foreign government, this approach would present the strange situation in which a judicial warrant would authorize the activity of a foreign government and this government's cooperation with it. Cooperating foreign governments will surely object to any provision that would expose their operations to even a limited number of judges. Further, the standards set forth in this bill may be incompatible with the needs for intelligence abroad. For example, under S. 3197, a U.S. person may be targeted only for counterintelligence purposes, but overseas he may be an important source of positive

foreign intelligence. Finally, whether the standards required for electronic surveillance of citizens in the United States are legally required overseas, or whether the same standards must apply in all foreign nations, is an open question. For instance, a citizen who has defected to a hostile foreign country may not be entitled to the same protections as one who is merely travelling abroad.

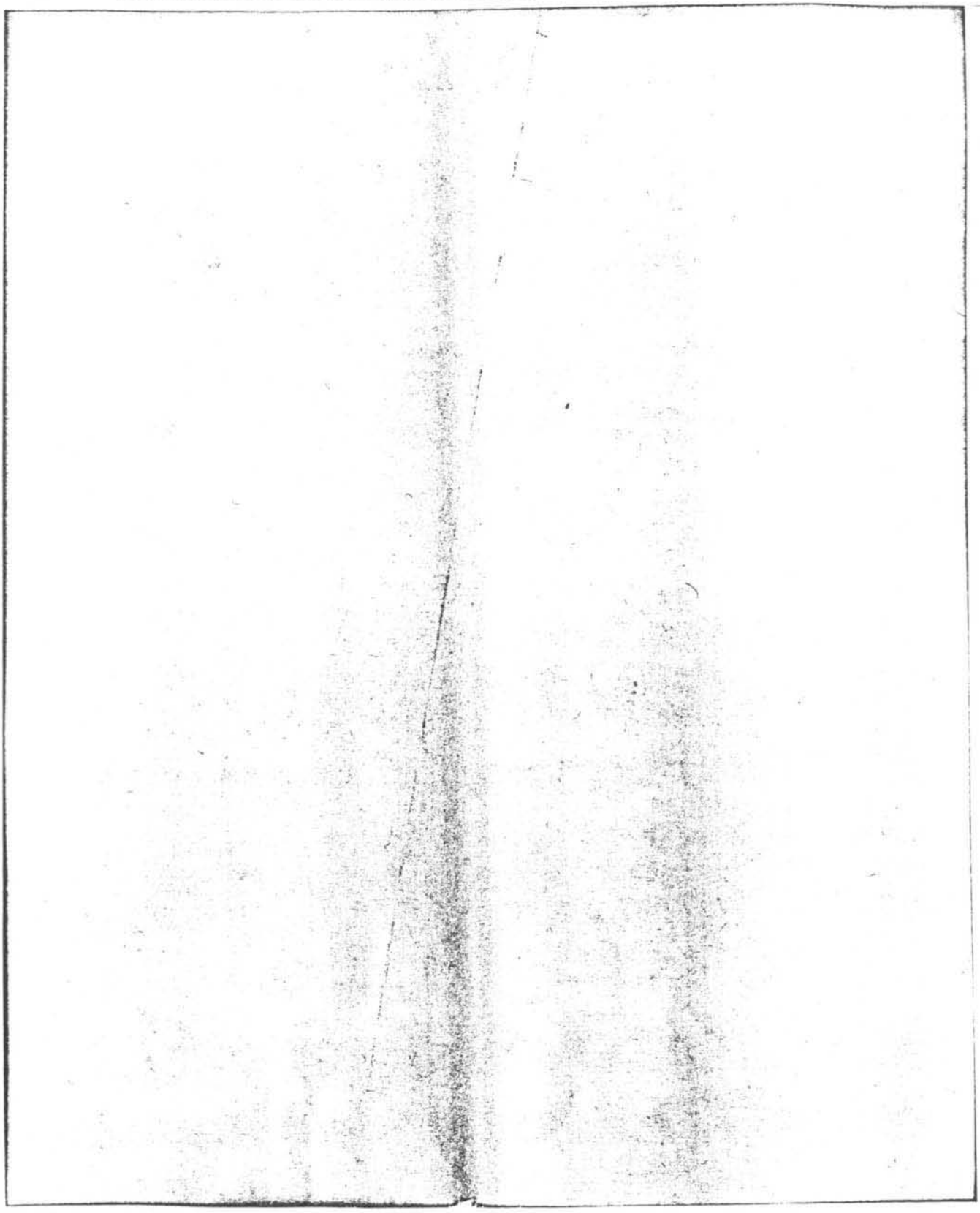
(U) (b) Expand the electronic surveillance bill to cover the targeting of United States persons abroad only when no foreign service is involved. This approach would give the appearance of protection without raising the problems involved in joint operations. Its protection would, in fact, be ephemeral in light of the practice of the CIA. It would also be subject to the criticism that the protections of the bill could be thwarted by involving a foreign service. Such a provision could also be diplomatically sensitive since it would seem to imply that this government could, or intends to, conduct surveillances abroad without the knowledge of the host foreign government. Finally, this option would raise the same kinds of problems involving the possible disparity in standards and procedures discussed above.

(U) (c) Restrict legislation to surveillance within the United States. This was the approach of S. 3197, and it appeared acceptable to the Senate. The standards and procedures under which electronic surveillance would be conducted could more easily be tailored to overseas considerations in a separate bill. Moreover, chapter 119 of title 18, relating to electronic surveillance for law enforcement purposes, only applies in the United States. If warrants for overseas electronic surveillance are to be statutorily prescribed, they should be available in both law enforcement and intelligence matters.

Recommendation:

(U) The electronic surveillance bill should be restricted to surveillance within the United States. The Department of Justice should work with the other interested agencies to consider other legislation to cover electronic surveillance abroad, which might or might not include a judicial warrant procedure.

III. Coverage of NSA activities */ (U)



Options: The spectrum of options includes the following:

~~(S-HVCCO)~~ (a) Provide a warrant requirement whenever a United States person in the United States is targeted; include in the bill a specific authorization to the President to authorize electronic surveillance targeted against foreign powers and non-United States persons with minimization procedures approved by the Attorney General and reported to Congress to be used to protect those United States persons who may be incidentally intercepted. The effect of this option would be to statutorily authorize without a warrant

[redacted] Practically, it would require a warrant only in counterintelligence cases. Theoretically, this is a very rational approach, because it has been generally acknowledged that surveillances of foreign powers would be "automatically" approved, and if this is the case, there should be no need for a warrant. In these cases, the incidental interceptions of U.S. persons would be protected by minimization procedures approved by the Attorney General and reported to committees of Congress, as opposed to approved by a judge under S. 3197. Only when a United States person was actually the target of the surveillance would a warrant be required.

(U) Acceptance of this option would constitute a significant change from S. 3197, which change unfortunately will probably be perceived by certain knowledgeable Members of Congress as a dilution of the safeguards of S. 3197, and consequently is likely to be met with some resistance. This perception and resistance may be able to be overcome by this option's extension of protection to international communications by United States persons, which were largely unprotected by S. 3197, and by allowing judges to review Executive Branch certifications (see Issue VI), which was not permitted in S. 3197. */

This option, if it can be sold to Congress, represents the best outcome for the intelligence agencies because it eliminates a warrant requirement in those cases where it is least necessary and most likely to be harmful to the national security. In addition, it would constitute a statutory authorization for these electronic surveillance and communications intelligence activities, which at the present time rest on the uncertain existence of inherent Presidential powers. Statutory authorization for such activities is strongly desired by NSA, Justice, and the FBI. Nor would

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*/ After preliminary discussions with key Congressional staff members, the Department of Justice concludes that this option will be met by fierce resistance in Congress, including Members who supported S. 3197. It may even be difficult to find bi-partisan support for introduction of the bill.

this option results in any meaningful diminution of protection for United States persons in comparison with S. 3197, but rather would -- with respect to international communications -- expand the protections beyond those of S. 3197.

~~(S-HVCCO)~~ (b) Exclude from the definition of "electronic surveillance" that electronic surveillance exclusively of foreign powers and add a warrant requirement when NSA targets United States persons in the United States. This approach would eliminate the warrant requirement for those NSA activities in the United States to which the Intelligence Community has objected. */ In consideration for that deletion a new warrant requirement would be added where NSA targets a United States person in the United States by a means which would not otherwise be covered. The effect of this option would be to eliminate NSA from all the provisions of the bill except when it targets United States persons in the United States. Not only would this eliminate the warrant requirement generally, but it would also mean that the disclosure and reporting provisions of the bill would not apply to NSA, except when it targeted United States persons in the United States.

[redacted]

~~(S HVCCO)~~ The difficulties with this option are that it would create serious drafting problems, in that the language necessary to exclude certain NSA activities, [redacted] but not exclude certain FBI activities, [redacted] would be exceptionally complex and may possibly allow a knowledgeable reader to discern with some accuracy the nature of NSA's activities. And more fundamentally, under this option the bill would create only two categories of surveillances -- those within the bill which would require a warrant and those without which would not be recognized by the bill at all. Given that one of the primary purposes of the bill is to legitimize by statute sensitive intelligence collection operations, to exclude many of the most sensitive operations -- merely to avoid a warrant requirement -- would leave an important sector of intelligence gathering activities without statutory authorization and, thus, may be counterproductive. This is especially so when there is increasing reluctance on the part of common carriers to render necessary assistance to these sensitive operations.

(U)(c) Leave S. 3197 unchanged as to its effect on NSA -- i.e., cover all wiretapping and bugging in the United States and all intercepting of radio transmissions where both the sender and all recipients are in the United States. S. 3197 was designed so that a judicial warrant would issue "automatically" when the target was a foreign government. In this sense, the legislation was an authorization for, not a restriction on, activities targeted against foreign government establishments.*/ Indeed, the legislation ensured the cooperation of cable companies with the government by requiring the assistance of those necessary to conduct the surveillance pursuant to the warrant. This approach required a judicial warrant for all surveillance within the United States -- and was "sold" on that basis. Proponents of it argued that the approach offered the assurance, by legislation, that the technology and capability of some agency, like NSA, could not be used to target, without a judicial warrant, purely domestic communications.

(U) The automatic nature of the warrant procedure for these targets also cuts in the opposite direction. Because the NSA activities covered by S. 3197 are all directed against foreign powers exclusively -- U.S. persons are almost never direct parties to the intercepted information -- a warrant requirement

*/ There was considerable fear in the Intelligence Community, however, that judges would look behind the certifications of Executive officials and question the Executive's decision to target certain foreign governments.

may needlessly involve the court,*/ create an administrative burden (for new applications to the judge every 90 days), result in an inflated figure to be reported of the number of surveillances approved, and create a certain security risk. Further, Congressional leaders indicated in the consideration of S. 3197 that they were generally unconcerned about protecting foreign powers themselves: their concern was for the protection of citizens and resident aliens who would rarely be parties to communications intercepted by the NSA activities covered by S. 3197.

(U) While S. 3197 did not distinguish in the standards for warrants between surveillance of foreign powers and surveillance of other entities, including United States persons, such a distinction could be made under this option. That is, the warrant for a surveillance directed against a foreign power could be for a year, rather than 90 days; the statement of the means by which the surveillance would be effected could be eliminated or abbreviated; and the statement of the basis for the certification (see Issue VI) could be eliminated. Such a hybrid warrant for surveillances targeted against foreign powers would meet many of the objections of the Intelligence Community with regard to the warrant requirement, but would retain the emotionally

*/ Even though the court's role is restricted as to targeting -- i.e., a showing that the target is a foreign government's establishment leads to the issuance of a warrant -- the court does play an expanded role as to minimization procedures for maintaining and disseminating information. It must determine whether these procedures are reasonable.

and legally important fact that a judge would finally authorize the surveillance. Moreover, this option would leave oversight of minimization to the judge, not to Congress or the Executive Branch. And whatever the security problems may be with respect to court approved surveillances -- even involving the most sensitive techniques -- they would appear to be less than the alternative of Congressional oversight under option (a). Preliminary negotiations with key Congressional staff members indicate this option would be acceptable to Congress.

(U) (d) Exclude all NSA activities. This option rests on the premise that a warrant requirement is not necessary because none of the activities of NSA are directed at U.S. persons. It does not, however, recognize the potential of NSA capabilities and, as a result, does not give any assurances to the public that these activities are subject to legislative standards and procedures. Moreover, this option, being a retreat from S. 3197, is unlikely to be acceptable to Congress.

Recommendation:

(U) The subcommittee, except for the Department of Justice, recommends option (a). The Department of Justice recommends option(c) with the warrant requirement for

surveillances directed against foreign powers changed to allow for substantially longer periods of time before reauthorization and changes made to the application requirement in such surveillances to reduce the amount of sensitive information that would need be transmitted to the judge and to eliminate any fear that the judge might go behind the certification.

IV. Reservation of the President's Constitutional Authority. (U)

(U) The Issue: Title III of the Omnibus Crime Control Act contains a proviso stating that nothing in that Act -- which prohibits wiretapping and the use of listening devices without a warrant -- or 47 U.S.C. § 605 -- which prohibits interception of radio communications without the consent of the sender -- shall limit the constitutional authority of the President to take such measures as he deems necessary to protect the Nation against foreign or domestic threats. S. 3197 would have repealed this proviso and replaced it with a provision disclaiming any intent to affect whatever constitutional power the President might have with respect to (a) activities not within the definition of "electronic surveillance" and (b) situations "so unprecedented and potentially harmful to the Nation that they cannot be reasonably said to have been within the contemplation of Congress." Part (a) of the proviso was considered necessary to avoid placing the NSA activities not covered by the bill in the legal jeopardy posed by the criminal provisions of Title III and 47 U.S.C. § 605. Part (b) was included to avoid placing extraordinary and unforeseen contingencies in an inflexible legislative box.

Options:

(U) (a) Retain the S. 3197 Presidential proviso. The need for such a proviso would be almost eliminated if option (a) in the foregoing issue is accepted. This is due to the fact that all of NSA's activities affected by 47 U.S.C. § 605 and Title III would be within the scope of the bill, but, unless targeted against a United States person, would not be subjected to a requirement for a prior judicial warrant. Finally, any reference to inherent Presidential power creates immediate opposition in Congress.

(U) (b) Eliminate the proviso entirely. This option would be readily supported by Congress, and would not, as far as we can determine, create any difficulty for the intelligence agencies. Unforeseen contingencies, a real problem under S. 3197 because of the requirement that electronic surveillance could be undertaken only in the defined situations, would seem no longer a problem because of the broad authorization to the President where the target is not a United States person.

(U) (c) Substitute in lieu of a reservation of Presidential power an explicit disclaimer as to activities outside the definition of "electronic surveillance." While not absolutely necessary, such a disclaimer would insure that activities

not intended to be covered by the bill would not be construed by the courts to be within the bill. Such a provision, absent a reference to Presidential powers, should not be opposed by Congress.*/

Recommendation: Option (c).

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