V. Standard for targeting United States persons for electronic surveillance. (U)

(U) The Issue: This is the most politically controversial issue in the bill. Under S. 3197, before issuing a warrant the judge must find that there was probable cause to believe that the target was a foreign power or agent of a foreign power. As originally introduced, the bill defined an agent, in part, as one who is engaged in "clandestine intelligence activities" pursuant to the direction of a foreign power. In the Senate Intelligence Committee, the bill was amended to move the standard closer to criminal activity. As reported by that Committee, a United States person could be considered an agent if he engaged in terrorist, sabotage or clandestine intelligence activities on behalf of a foreign power in violation of law or he (1) acted pursuant to the direction of a foreign intelligence service (2) which service engaged in intelligence activities in the United States on behalf of a foreign power, (3) and in so acting transmits information or material to such service, (4) in a manner intended either to conceal the nature of the information or material or the fact of such transmission, (5) under circumstances which would lead a reasonable man

to believe either that the information or material will be used to harm the security of the United States or the lack of knowledge of such transmission will harm our security.

(U) Options: There are basically two options:

(U) (a) Require a showing of unlawful activity in every case. This option eliminates the second prong of the Intelligence Committee test. It ensures that an individual will not be subject to surveillance by the government unless he commits or is about to commit a crime and, thereby, employs the conventional notion of probable cause. While most activities in which the government is interested in detecting for counterintelligence purposes would involve violations of the Federal law, particularly if failure to register under the foreign agents registration acts is included as one of the designated crimes, */ there is a limited area of uncertain dimensions, however, that might not be covered. For example, the clandestine collection of information by an agent of a foreign power concerning important industrial processes essential to the national security, e.g., computer technology, refining of

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*/ If they would not be included, coverage would be unacceptably limited because of the antiquated state of our espionage laws.

natural resources, etc., may not violate any Federal statute. And it might not permit surveillance in cases where the FBI observes an individual passing information in an obviously clandestine manner to a known intelligence agent. Moreover, there would be a certain dishonesty in conditioning counter-intelligence electronic surveillance on unlawful activity, because the surveillance is not for the purpose of enforcing the criminal laws of the United States.

(U) (b) Adopt a standard that requires a showing of either unlawful activity or circumstances that are clearly probative of intelligence activity by a foreign power's intelligence network. This option would permit the use of electronic surveillance if a judge found probable cause that the clandestine acts either violated the law or met a strict standard deemed probative of intelligence activity. It would not guarantee that this intrusive technique could only be used upon a showing of unlawful activity. However, it would provide the protection of a judge who would make a case-by-case determination applying the facts to a restrictively drawn standard. While this was the approach of S. 3197, if this option is adopted, certain refinements in S. 3197's provision should be considered.

Recommendation: Option (b).

VI. The Certification that Information Sought is Necessary to the Security of the Nation. (U)

(U) The Issue: As discussed earlier, S. 3197 required an application for a court order to include a certification by a high Executive official that the information sought was foreign intelligence information. The certification included a statement describing the basis for the certification. The purpose of this statement was to ensure that the Executive officials would not rubber stamp certifications but rather would be required to exercise their judgment. Under S. 3197, the judge, while determining whether there was probable cause to believe the target of the surveillance was a foreign agent or a foreign power, was only to determine whether or not a certification had been made; neither the basis for nor the accuracy of the certification was subject to review. While S. 3197 and the Intelligence Committee's report were explicit as to the fact that the judge could not review the certification, intelligence agencies and the Department of State were concerned that a detailed statement of the basis for the certification would necessarily invite review. The lack of judicial review of the certifications, on the other hand, was one of the major criticisms of S. 3197 by its opponents.

Options. The options are essentially:

(U) (a) Leave S. 3197's provision unchanged. Under S. 3197 if a judge were to have reviewed certifications, he would have been permitted in effect to second-guess Executive Branch determinations of what was important to our foreign policy and national security. If option (a) of Issue III is accepted as recommended, however, there will be no requirement of judicial review except in counterintelligence cases. This eliminates almost all of the fears of the Department of State and the intelligence agencies. Nevertheless, even in the limited area of counterintelligence cases, judges may not agree with Executive Branch determinations of the necessity to acquire certain types of information, e.g., personal information to be used for possible recruitment. Thus, providing a judge the opportunity to review the certification to some degree may threaten the acquisition of certain types of information.

(U) (b) Allow the judge to review certifications. Since under option (a) of Issue III a warrant is only required for counterintelligence or counter-terrorism purposes, this option would avoid the substitution of a judge's view for that of an Executive official on foreign policy needs. Where a warrant is required, the facts demonstrating that

the target is an agent of a foreign power would very likely be the same for showing that the information sought is necessary to protect against the clandestine or terrorist acts of a foreign power. Moreover, allowing review on some basis with respect to United States persons will go a long way to meeting the criticisms of the certification requirements in S. 3197. Finally, such a concession may help to sell option (a) in Issue III to Congress. */

(U) Recommendation: Option (b) with judicial review limited to a finding as to whether the certification was clearly erroneous. CIA would recommend option (a) with a fallback to option (b) if necessary.

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*/ If the Department of Justice's recommendation under Issue III is adopted, the certification should not be reviewable in any case where the target is a foreign power, and in such cases the statement of the basis for the certification should be eliminated.

VII. Disclosure of sensitive information in judicial proceedings. (U)

(U) The Issue: When a defendant makes a motion under 18 U.S.C. § 3504, the government must affirm or deny whether it has engaged in any electronic surveillance of the defendant -- whether or not related to the case. All intelligence agencies are canvassed to determine whether they have ever intercepted the defendant intentionally or incidentally. Under current case law, if the defendant's communications have been incidentally intercepted the court in camera and ex parte must determine whether the surveillance was lawful. If it finds the surveillance was unlawful, the court must, except in rare instances, disclose the facts of the surveillance to the defendant to permit a hearing on the question whether the government's case is tainted, unless the government drops the prosecution. If the court determines the surveillance was lawful, the § 3504 motion is denied.

(U) S. 3197 alters this procedures by allowing the judge upon the filing of a motion "in his discretion [to] make available to the [defendant] or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." The judge thus may disclose this sensitive information whether or not the surveillance was lawful and whether or not it is relevant to the case. And because the issue is committed to his "discretion," a decision to disclose would be virtually unappealable.

Another provision in S. 3197 provides a different standard for disclosure where information obtained or derived from electronic surveillance will be used at trial; that is, where the government concedes that evidence is the fruit of a surveillance. The standard here is that the court "shall order disclosed to the [defendant] the order and application, or portions thereof, if it finds that there is a reasonable question as to the legality of the surveillance and that such disclosure would promote a more accurate determination of such legality, or that such disclosure would not harm the national security." These provisions were not considered acceptable by the Department of Justice at the time S. 3197 was reported.

(U) Options: The options together with pros and cons are as follows:

(U) (a) Retain the provisions in S. 3197.

(U) Pros: A hearing in camera and ex parte does not permit a defendant to raise any arguments or present any facts he might have on the question whether the surveillance was lawful or is relevant to his case. Disclosure of these surveillances would permit him to address these points and thereby fully ensure that his rights are protected.

(U) Cons: This option will make intelligence agencies more reluctant to provide information

which possibly could be used in a criminal trial. It may lead to unnecessary disclosure of classified information or, at least, dismissal of prosecutions even where the surveillance was lawful or irrelevant to the case. It is anomalous to adopt the extreme disclosure provisions with respect to surveillances instituted pursuant to the highly protective procedures of the bill, but retain current practice with respect to surveillances not instituted pursuant to the bill (e.g., overseas.)

(U)(b) Delete the provisions in S. 3197 and codify current practice.

(U) Pros: Current practice has been found to be adequately protective of defendants' rights while at the same time giving necessary protection to classified information. The procedures under the bill would not be inconsistent with responses to § 3504 motions not involving electronic surveillance under the bill. It would lessen the number of cases when prosecution would have to be dismissed.

(U) Cons: Congress will be reluctant to accept this change, and because of the complexity in practice of these provisions, it is difficult to convince Congress as to their importance. Also, the defendant is not afforded as

much opportunity as he might wish to find ways to block his prosecution. Finally, it is possible that defense scrutiny of these electronic surveillances could lead to a finding of unlawfulness that would not otherwise occur, and thus a certain measure of protection for defendants might be lost.

(U) (c) Attempt to modify the language or conditions in the S. 3197 provisions where it is clear that the surveillance has not tainted the case.

(U) Pros: This option would to a large degree mitigate the potential for disclosure where the surveillance is not relevant. It would provide protection to a defendant's rights where there was a reason for it.

(U) Cons: It raises constitutional questions under Alderman v. United States, 394 U.S. 164 (1969), but careful draftsmanship should be able to cure the problem.

(U) Recommendation: Option (b). This was essentially what the Ford-Levi bill originally proposed. Because of the expected reluctance of the Senate to this change, however, the Department of Justice should be prepared with alternate language to achieve the purposes in option (c).

TOP SECRET/SENSITIVE

SPECIAL COORDINATION COMMITTEE MEETING

14 April 1977

Time and Place: 0900-1015, Situation Room
Subject: Consideration of Attorney General's PRM/NSC-11 Subcommittee report on "Foreign Intelligence Electronic Surveillance Legislation"

Participants:

The Vice President
Denis Clift

State:
Secretary Cyrus Vance
Harold Saunders

NSA:
Benson K. Buffham
Gerard Burke

Justice:
Attorney General Griffin Bell
John Harmon
Michael Kelly
William Funk
Frederick Baron

Defense:
Secretary Harold Brown
Charles Duncan, Jr.
Deanne Siemer
Robert T. Andrews

CIA:
Stansfield Turner
Anthony Lapham

NSC:
Dr. Zbiginiew Brzezinski
David Aaron
Samuel Hoskinson
Robert Rosenberg

SUMMARY OF CONCLUSIONS

Dr. Brzezinski opened the meeting with commendation for the subcommittee's efforts, noting that they concluded that the Administration should introduce legislation on this subject. Failure to do so promptly will result in unilateral and potentially counterproductive initiatives by members of Congress. Each of the seven issues and conclusions discussed follow:

1. Should the bill include authorization for physical search? It was agreed that physical searches should not be included in this bill but that this problem should be studied further as part of PRM/NSC-11.

TOP SECRET/SENSITIVE/XGDS 2
Classified by: Z. Brzezinski

2. Should the bill be expanded to cover electronic surveillance of U.S. persons overseas? The Subcommittee had recommended that it should not, but that Justice should work on separate overseas legislation, which might include judicial warrant procedures. The Attorney General, Secretaries of State and Defense and DCI all expressed concern that the application of warrants to electronic surveillance operations abroad would severely complicate our problems in dealing with foreign intelligence services and result in exposure of liaison relationships or in denial of cooperation by foreign services who feared "leaks." The Vice President disagreed on the basis that the Constitution follows Americans abroad and without this provision, the Administration will face serious credibility in Congress. The group deferred a conclusion and remanded this issue back to the subcommittee for research on how liaison relationships might be protected prior to Monday 18 April.

3. Should the bill include communications intelligence and, if so, in what way? The subcommittee had recommended that the bill authorize without a warrant NSA's activities [redacted] which are directed solely against foreign powers and non-U.S. persons. The Attorney General and the Vice President dissented, proposing that special one-year and limited judicial warrants be required. The Secretary of Defense and DCI supported the Subcommittee recommendation, noting that this effort is directed only against foreign powers, with minimization procedures approved by the Attorney General to protect incidental intercept of U.S. persons, and that to involve the judicial branch would either be cosmetic in nature, or would tie our hands so much that the sources would dry up waiting for approval. Secretary Vance questioned what warrants would really accomplish but was inclined to agree with the Attorney General and Vice President. The group deferred a conclusion pending a further research by the Subcommittee due 18 April.

4. Should an explicit reservation of Presidential powers be included in this bill? The group unanimously agreed that no reference to Presidential powers should be within the bill.

5. What should be the standards for targeting a U.S. person? The subcommittee, with all principals except the Vice President concurring, concluded that a U.S. person should be able to be targeted if he engages in criminal activity related to clandestine intelligence, sabotage or terrorism or if he engages in non-criminal activity which clearly evidences activities on behalf of a foreign intelligence service which

threaten the national security or our foreign relations. While acceding to the majority, the Vice President asked the Attorney General to separately look at changes to the criminal law which would enable us to target U.S. persons without going beyond criminal standards.

6. Should the Executive Branch certification to the judge, when U.S. persons are targeted, that the information sought is properly foreign intelligence be subject to judicial scrutiny? The subcommittee recommended and the principals unanimously concluded that the judge should be able to review the certification only to determine if it is clearly erroneous.

7. What should be the standard for disclosure of sensitive information on judicial proceedings? The subcommittee recommended and the principals unanimously concluded judicial review should be limited to a finding as to whether certification was clearly erroneous.

It was agreed that one last attempt would be made to resolve issues 2 and 3 prior to 18 April and subsequent review by the President.

April 13, 1977

MEMORANDUM FOR THE VICE PRESIDENT

FROM: Fritz Schwarz

SUBJECT: Proposed Wiretap Legislation

file: Intelligence

A. General

1. Agree with decision to come forward with bill limited to electronic surveillance.

2. Note that at same time Administration will be working with Congress to develop more comprehensive Charters.*

B. Comments on the Seven Points in the Executive Summary

1. Leaving out "Physical Searches." This is okay, for the short term. But press Justice to start drafting language to define what is and is not lawful so that this subject can be covered in legislation as well. The agencies say important (and apparently legitimate) opportunities are being missed.**

Leave it in: Agree to work with Congress

2. Exclusion of Americans Overseas. Disagree. They should not be excluded. An American should be protected from warrantless bugs/taps by his government whether done at home or abroad.

Don't exclude Americans overseas

The arguments contra are weak and certainly don't outweigh the principle:

(i) Can't trust the judges. But this is

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* Presumably you will have already discussed this approach with DCI Turner (and (?) Bell) and then mention it to the group as a whole.

** If CIA or FBI ask the President to authorize break-ins, etc., in the absence of warrants or statutory authority, should say no and again stress the desirability of working on a statute.

just as true for domestic activity -- and the whole structure of the bill is to set up specially secure courts.

(ii) Most such surveillance is done by foreign agencies -- if they do it on their own, okay. But what we shouldn't be doing without a warrant is inducing them to bug or tap Americans.

(iii) Covering foreign activities will be provocative or seem dangerous to foreign intelligence services. But (a) this is taken care of by drafting, (b) misconstrues what would happen under the bill. The court will not get involved in the operations of any foreign intelligence agency. All it need do is to pass on whether our agency should be permitted to induce a foreign agency to tap an American, and, under the normal minimization rules, what our agency can do with any information it receives.*

3. Pulling Back from the Levi Bill to Exclude Taps of Foreign Powers and Persons. Disagree and agree with Justice that this is unwise:

(i) Politically

(ii) Constitutional risk

(iii) The line between foreigners and Americans

* There may be a few peculiar wrinkles. But if the group is told that Americans should be covered overseas, those wrinkles can quickly be focused upon.

isn't really that clear. Americans talk to foreigners (but not over certain lines covered by NSA).

Also agree with Justice that where a foreign power is the target some changes may be appropriate in, e.g., how long a tap can last under a warrant. Ask that these changes be discussed in an option paper, which also focuses on which of those differences should apply to foreign individuals*, as opposed to foreign powers themselves.

4. No Inherent Authority Reservation. Agree.

(Note that if your position prevails on points 2 and 3 the intelligence agencies may want to re-argue this. I still doubt whether the phrase inherent authority ought to be used. What would be appropriate to say is that this bill is not intended to cover signals intelligence activities of the U.S. Government which are not contained within revised definition of electronic surveillence. This would make clear NSA activities outside the U.S. and not targeted upon U.S. citizens would not be prohibited. Doubtful if you should get into this detail tomorrow. Might just say "inherent authority" raises unnecessary hackles and they should draft diplomatically discrete language that allows NSA's legitimate activity overseas.)

*There is a tendency to say all foreign visitors are suspect. That is the way Russia treats its visitors. We shouldn't. Persons who appear to be foreign spies are different.

5. Going Beyond Criminal Law as Cause for Targetting U.S. Persons.

a. The proposal is much tighter than the original Levi Bill. (See the list of five on pp. 27-28.)

b. That being so, the question arises whether the supposedly noncriminal activity is not already a crime and, if not, whether it couldn't and shouldn't be made one.*

6. Standard of Review by Judge of Whether Information Sought on U.S. Persons is "Foreign Intelligence."

a. This concerns only one of the factors which the bill requires be present before a warrant can be issued. It does not concern the findings which the judge must make as to whether the person is an agent of a foreign power about, for example, to commit a terrorist crime. As to this, as is normal under the Fourth Amendment, the judge must find probable cause. The issue here rather is whether the judge should make any finding with respect to whether the information sought is "foreign intelligence information."

The Levi Bill required the judge simply to accept the executive branch certification. The group proposes to

*Don't be too loose in saying anything that is a crime justifies a tap. Under both the Safe Streets act and the criminal part of this bill, the crime must be one of substantial seriousness. The Foreign's Agents Registration Act may be overly broad to include it as a crime suspected violation of which justifies a tap. But the Espionage Agent's Registration act deals with a more serious problem.

let the judge decide whether the executive branch certification is "clearly erroneous" -- but only where the target is a U.S. person. Where the target is a foreign power, the Court (as with Levi) simply accepts the certification (and that makes sense).

b. What is unclear is the practical significance under the bill of a finding that foreign intelligence is involved. You should ask for an explanation of practical significance. Also would that change if your proposal on number 5 is accepted?

7. Disclosure in Judicial Proceedings. I do not fully understand the explanation at pp. 33-36. It suggests that last year's bill authorized more disclosure to defendents of these taps than is normal under current practice. Certainly that doesn't make sense. If what they say is correct. I agree with their proposal to ratify current practice.

C. Further Thoughts

1. The task force ought to continue to work with the appropriate congressional people. And if changes in approach come out of the meeting they should be brought up to date.

2. While it is appropriate, given last year's history, to move this bill along separately, the argument that Congress is pressing should not be allowed to cause rushed and unwise decisions. The way to deal with Congress is through point 1 above.

3. The options paper approach is very useful in highlighting key issues (and the staff should be congratulated for doing so).

Actual draft statutory language implementing the decisions is now also necessary.

(a) While the main issues have been identified, it is inevitable that the actual language will cause at least a few new problems.

(b) The impression created by the draft I have seen is awfully turgid. Perhaps that is inevitable but some of the power of our first couple of recommendations would seem appropriate.

4. Someone should draft a paper for public release showing how this Administration's bill improves upon last year's bill -- which it will only do if the changes recommended above are made.

APR 11 1973

file: Intelligence

Executive Summary

The attached report of the SCC subcommittee appointed by the Attorney General pursuant to PRM/NSC-11 concerns legislation governing electronic surveillance for foreign intelligence purposes within the United States.

The subcommittee's conclusion is that the Administration should introduce legislation on this subject. The Attorney General strongly favors such legislation, and a failure of the Administration to introduce legislation forthwith will result in unilateral initiatives by various members and committees of Congress. The SCC subcommittee further concludes that S. 3197, as reported by the Senate Intelligence Committee in the last session of Congress, should be the basis for the Administration's bill with certain changes. The report discusses seven policy issues for possible changes to S. 3197.

The issues and recommendations are:

(1) Whether the bill should include physical searches -- the recommendation is that it should not;

(2) Whether the bill should be expanded to cover electronic surveillance overseas -- the recommendation is that it should not; [opposed: purposeful targeting of Americans, wherever, is covered.]

(3) Whether the bill should include communications intelligence and, if so, in what way -- the recommendation is that the bill should authorize the President to approve

1) The instruction: Hurry & get a draft on physical searches: Tell Congress we're working, this should be ahead

(7) What should be the standard for disclosure of sensitive information in judicial proceedings -- the recommendation is that the current, judicially-derived procedures for in camera determination by the court whether an electronic surveillance was lawful be codified in the bill.

John M. Harmon
Subcommittee Chairman
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

APR 11 19??

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.

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