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.

[redacted]

[redacted]

(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

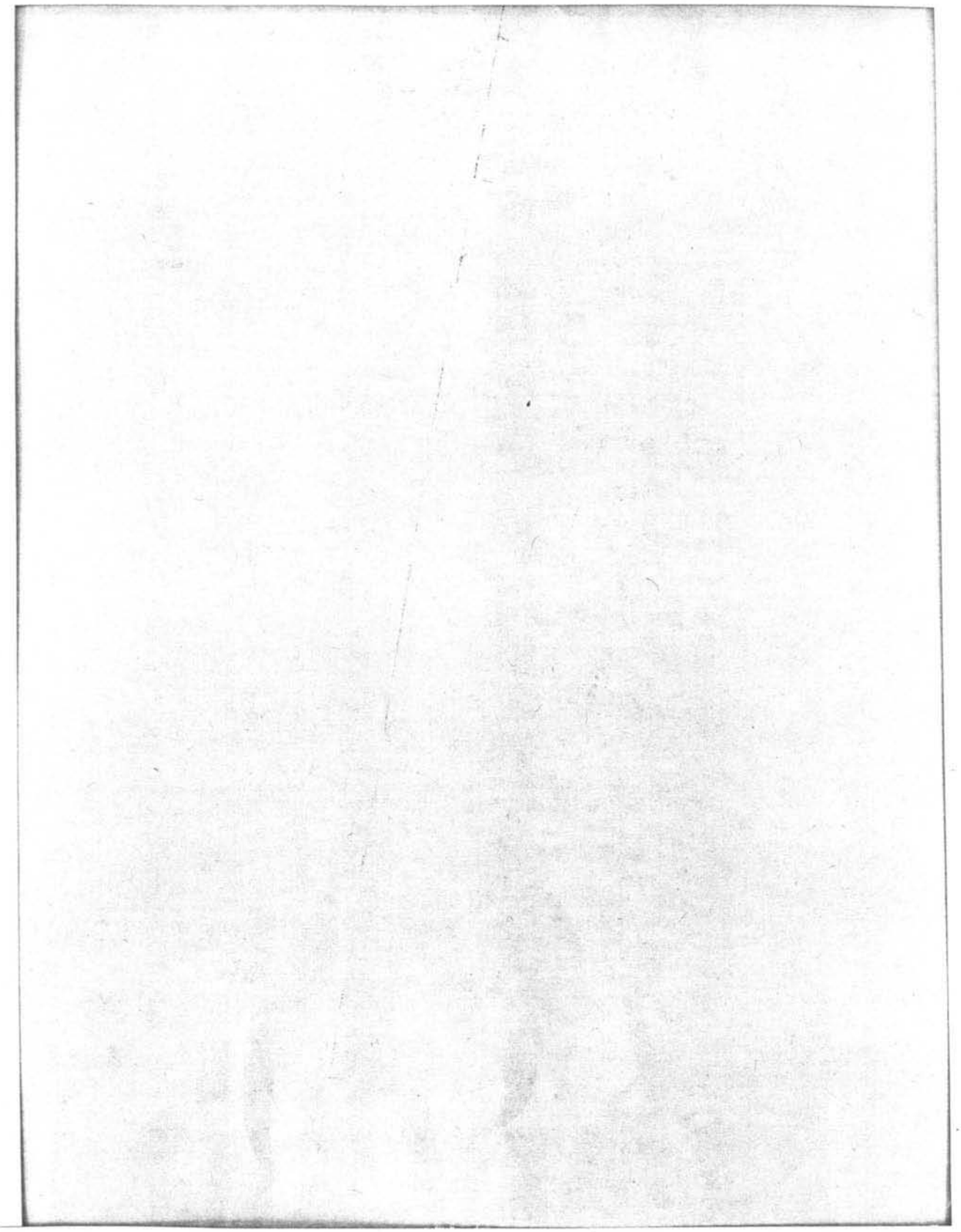
foreign intelligence. Finally, whether the standards required for electronic surveillance of citizens in the United States are legally required overseas, or whether the same standards must apply in all foreign nations, is an open question. For instance, a citizen who has defected to a hostile foreign 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.



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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 result 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]

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

~~(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).

[redacted]

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).

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 [illegible] ss that would not otherwise occur, 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 [illegible] otential 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 [illegible] nship should be able to cure the problem.

(U) [illegible] mmendation: 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).

MEMORANDUM

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Memo No. 822-77
April 13, 1977

MEMORANDUM FOR THE VICE PRESIDENT

FROM: Denis Clift

SUBJECT: Foreign Intelligence and Strategy with the Congress

Attached is the memorandum from you and Turner to the President on intelligence charters. It has been sent to Turner for his comment.

On Thursday, April 14, 1977 at 10:00 a.m. immediately following the SCC meeting on wire tap legislation, you will be discussing this memorandum with Turner, Brzezinski, Vance, Bell and Lipshutz. With the exception of Turner, other participants have not received a copy of the memorandum.

TALKING POINTS

1. As part of the overall review of intelligence issues that the President has directed, Stan Turner and I -- together with you and your representatives -- have been taking a hard look at the steps required to keep the review and reform process headed in the right direction.

2. We have prepared a memorandum for the President which would flag for his attention and decision some preliminary decisions required -- decisions on legislative charters for the intelligence agencies, and the approach to be taken with the Congress on intelligence legislation.

3. In brief, the memorandum recommends that the President endorse the principle of clear broad charters for the agencies and that he have early meetings with the Inouye Committee and, initially, with Tip O'Neill in the House:

   -- to dispel any suggestion that the Administration is opposed to legislative charters, and at the same time

   -- to head off premature efforts by the Congress to force the Administration's hand on the substance of such legislation.

intelligence agencies. The danger with endorsing charters is that the legislative drafting could get out of control in the Congress and result in excessive legislative detail that would limit flexibility in the use of intelligence agencies and hamper their effectiveness. However, the Congress is moving ahead. The Senate Select Committee on Intelligence is currently drafting intelligence legislation. Our judgment is that you should take the initiative on the principle of endorsing charters and legislation.

We believe it would be useful for you to schedule an early meeting with Senator Inouye and the members of the Committee -- and to schedule parallel consultations with Tip O'Neill -- to inform them of the basic direction your intelligence review is taking and to reach a preliminary understanding with the Congress on a schedule for legislation that will enable the Executive and Legislative branches to work together. Your purpose would be to:

-- state that there is agreement on the general principle that there should be legislation that provides appropriately for Congressional oversight of intelligence activities;

-- state that the Executive Branch currently has this issue together with the other facets of intelligence organization and management under review, and that you are expecting the results of this review in June;

-- state that following your consideration of this review and sharpening of the Administration's position you will want the Administration to work closely with the key Congressional committees to reach agreement on the overall shape of intelligence legislation -- premature action by either branch would be counterproductive;

-- urge the Senate and the House to proceed, at the same time that the Administration's review is underway, to organize themselves better for their intelligence oversight role;

-- propose a general timetable for action this year by the Executive and Legislative branches;

-- issue a public statement following the meeting on the agreement reached on legislation and the timetable involved;

-- in sum, to dispel any suggestion that the Administration is opposed to legislative charters, to assure the Congress that you want to work with it, and to head off premature efforts by the Congress to force the Administration's hand on the substance of such legislation.

A more detailed review of the issues is at Tab B. Talking points for the meetings with the Senate Committee and Tip O'Neill are at Tab A. A proposed schedule for Executive and Legislative action is at Tab C. A recommended public statement is at Tab D.

RECOMMENDATION

1) That you approve acceptance of the broad principle of intelligence legislation, recognizing that what is required is broad and clear statutory authority for the intelligence agencies but not a level of legislative detail that would infringe on your authority or hamper the agencies' effectiveness and flexibility.

APPROVE _____ DISAPPROVE _____

2) That you schedule early meetings with the Senate Select Committee and with Tip O'Neill to reach agreement on the basic approach to be taken by the Administration and the Congress on the development of intelligence legislation.

APPROVE _____ DISAPPROVE _____

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