



SEGREGATE

U.S. Department of Justice

Office of Intelligence Policy and Review

Washington, D.C. 20530

November 1, 1990

MEMORANDUM TO DAN LEVIN
OFFICE OF THE DEPUTY ATTORNEY GENERAL

Re: Possible Amendments to FISA

As we discussed on October 31, 1990, this Office has been working with the National Security Agency for the past three years to develop possible amendments to the Foreign Intelligence Surveillance Act to meet a need created by technological advances. We are close to agreement on the language that would serve this purpose. There is a basic policy issue, however, as to whether this Department and the Administration wish to seek such an amendment at this time. It seems to me we should focus on this policy issue before any more time is expended on drafting specific legislation. (U)

A. The NSA Amendment

Until recently, NSA's collection of international and foreign communications was obtained from NSA, (b)(1)1.4c, (b)(3) interception from sites here and abroad. NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSA, (b)(1)1.4c, (b)(3), (b)(5)

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The definitions concerning NSA, (b)(1)1.4c, (b)(3) in the statute are broader. A court order is required if a particular U.S. person is targeted or if one party to the communication is in the United States. § 1801 (f) (1) and (2). NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSA, (b)(1)1.4c, (b)(3), (b)(5)

While this resolved the matter of intercepting NSA, (b)(1)1.4c, (b)(3) NSA, (b)(1)1.4c, (b)(3) NSA is still prohibited from obtaining international communications with one terminus in the United States without a court order. NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSA, (b)(1)1.4c, (b)(3), (b)(5)

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 NSA, (b)(1)1.4c, (b)(3), (b)(5) The current draft does this. It
 provides for Attorney General certification, rather than court
 order, NSA, (b)(1)1.4c, (b)(3) NSA, (b)(1)1.4c, (b)(3)
 NSA, (b) NSA, (b)(1)1.4c, (b)(3) ~~(TOP SECRET - HVCCO)~~

B. Other Amendments to FISA

From time to time substantive and procedural problems have been identified in the existing statute and suggestions for amending it have been made. These problems were not of such significance, however, that we deemed amendment (with the attendant risks of undesired changes) warranted. If amendment to resolve NSA's problem is sought, we should consider whether some or all of these other amendments should be added. (U)

1. Time periods. FISA allows a duration of one year for orders covering foreign powers, and 90 days for all other orders. The FBI has suggested extending the time period for officers and employees of foreign powers to a full one year or, in the alternative, 6 months. These officials are subject to continuing coverage solely on the basis of status and it seems rather pointless to have to renew every 90 days. (U)

2. Emergencies. The Attorney General may authorize a surveillance in an emergency but a completed application and certification must be approved by a court within 24 hours. The criminal wiretap statute, in contrast, allows a 48 hour emergency surveillance. The FBI has suggested that the emergency provision of FISA be expanded to 48 hours or, perhaps, 72 hours in recognition of the fact that signatures are required from both the intelligence agency head and the Attorney General. (U)

3. Certification. Except for the National Security Adviser, all those authorized to certify surveillances are advice and consent appointees. This creates a problem in the FBI which has only one such official. If he is out of town, FBI surveillances must either wait for his return or be taken to officials of other agencies. The FBI has suggested amending the statute to allow the Deputy Director to certify in the absence of the Director. (U)

4. Foreign Officials. FISA currently authorizes targeting a foreign official "acting in the United States" NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSA, (b)(1)1.4c, (b)(3), (b)(5)
 NSA, (b)(1)1.4c, (b)(3), (b)(5)

NSD, NSA, CIA, (b)(1)1.4c, (b)(3), (b)(5)

NSD, NSA, CIA, (b)(1)1.4c, (b)(3), (b)(5)

C. Policy Issues Relating to Amendment

In deciding whether to seek amendment to the FISA statute there are a number of policy and tactical issues to be addressed. In considering them it is important to remember that committee jurisdiction in both the House and Senate is concurrent between the Intelligence and Judiciary Committees. In this connection, it should be noted that in the past FISA jurisdiction in House Judiciary has been assigned to Congressman Kastenmeier's subcommittee. The problems giving rise to the possible amendments have all been discussed with the Intelligence Committees but not, to my knowledge, with the Judiciary Committees. (U)

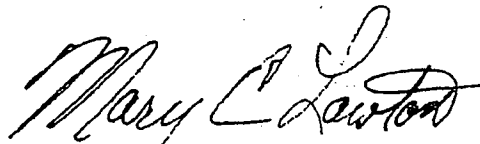
When FISA was initially considered there were strong dissents opposing its enactment on grounds of separation of powers. The Administrations of Presidents Ford and Carter backed the legislation, however, because of the practical imperative of continuing to collect foreign intelligence in the face of growing resistance from the communications common carriers whose cooperation was essential. NSA views the changing technology as creating a similar practical imperative. Indeed, it could also be considered a legal imperative since the existing statute prohibits, under pain of criminal penalty, the collection NSA is seeking. A subordinate issue here is what form of amendment to seek. Does putting the proposed new collection under the statute, albeit on the basis of Attorney General certification, pose greater separation of powers

problems than attempting to exclude the collection from the statute? (U)

The related tactical issue is the risk of added congressional restrictions if the statute is opened to amendment. You recall that this year both the Jacobs' Panel and the House Intelligence Committee urged physical search legislation as an addition to FISA. Interestingly, the House Intelligence Committee discussed this amendment with Congressman Edwards and his staff, rather than Congressman Kastermeier. If we seek amendments, the search proposal may be renewed. Apart from that issue, the House Judiciary Committee, six years ago, suggested that the number of U.S. person surveillances should be reported openly. Moreover, the ACLU, which originally supported FISA, has now withdrawn that support and has suggested major amendments including provisions giving defendants far greater discovery rights to FISA material than now exist. Efforts to amend FISA could reopen these proposals as well as others we cannot anticipate at this time. (U)

It should also be noted that the proposed amendment to FISA to resolve the NSA problem, whether cast as an inclusion or an exclusion, is certain to be written in such enigmatic terms that only those who have been briefed in executive session will understand them. This is bound to create speculation in the media about what is really intended and probably deep suspicion that something sinister is going on. This will be hard to counter in public. (U)

In light of these considerations we need to review the potential loss to NSA of deciding not to seek amendment and weight it against the risks of opening FISA to amendment. (U)



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