Executive Registry
76-6939

OGC 76-0641

10 February 1976

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT : Proposed Foreign Intelligence Surveillance Act of 1976 -- Conflict with Inherent Presidential Power

1. The subject legislation would unnecessarily involve both Congress and the Judiciary in an area heretofore considered the Executive's exclusive domain. Two United States Courts of Appeals have already held that warrantless electronic surveillance for foreign intelligence purposes which is authorized by the Attorney General pursuant to Presidential power does not violate the Fourth Amendment. In one of these cases, United States v. Butenko, 494 F.2d 593 (3d Cir. 1974), the Government did not oppose the petition for writ of certiorari on this question, arguing that the practice is lawful and "not subject to prior judicial scrutiny." Memorandum for the United States on Petition for Writ of Certiorari at 10-11, Ivanov v. United States, 419 U.S. 881 (1974). The Supreme Court denied the petition without comment.

2. Not only would introduction of the legislation proposed by the Attorney General constitute a radical reversal of the Executive branch position on this issue, but it would completely negate the strongest argument against any similar congressional proposals -- that the subject is an inappropriate one for involvement of the other branches of Government. Congress previously recognized this by disclaiming any intent to touch Presidential power when it passed the electronic surveillance provisions of the Omnibus Crime Control and Safe Streets Act of 1968. That act, among other things prescribes judicial warrants for law enforcement purposes, and goes on to state that nothing in the act is intended to impinge on the constitutional authority of the President "to obtain foreign intelligence." In the post-Watergate, post-Vietnam climate many in Federal Government and outside, including some constitutional scholars, feel that a backlash erosion of Presidential powers and prerogatives must be forcefully resisted.

3. The Agency would not be as directly affected by the proposed legislation as would NSA and the FBI, although on occasion CIA has requirements for this activity and receives the product, where appropriate, of operations conducted by other agencies. In addition, we cooperate with the FBI on technical aspects as required. Nevertheless, the proposed bill cannot be viewed as other than a further obstacle to the U.S. intelligence

collection mission. It would seem preferable to continue the present procedure in which court review occurs only if the surveillance becomes an issue in another judicial proceeding, rather than providing for such review upon every surveillance request. Even if the foreign intelligence collection mission is thought by some to be secondary to the creation of a neat judicial record for use in a possible collateral proceeding, Section 3504 of Title 18 United States Code currently provides a procedure for an opposing party to raise the electronic surveillance issue. Thus, there is no danger of abuse of authority if the bill is not enacted, and the matter really comes down to the wisdom and desirability of prior judicial review.

4. In the final analysis, the current furor and consequent political pressure stem not from the surveillance of foreigners, foreign agents, or foreign governments -- legitimate foreign intelligence targets -- but from past surveillance of U.S. citizens, such as the alleged Kissinger request for the tap which took place on Morton Halperin. Senators Church and Tower received a briefing here at Headquarters on technical surveillance of foreign intelligence targets in the U.S. and apparently had no problem with it. If public reassurance is needed, the pending Executive order can accomplish that by providing that electronic surveillance of U.S. citizens within the United States is prohibited.

5. While it can be urged that CIA is not directly involved, as the DCI you should properly be concerned with any action which would decrease the capability of the Intelligence Community in the collection of foreign intelligence. In summary, the arguments against the legislation are:

a. It is not required since Presidents since Roosevelt have authorized foreign intelligence wiretaps, and no court has disagreed. In fact, two circuit courts have approved.

b. Constitutionally, collection of foreign intelligence is reserved solely to the Executive and the Executive should not urge and support bringing the Judiciary into the picture.

c. The Executive in pushing legislation for judicial warrants with respect to collection of foreign intelligence against foreigners destroys one of its major arguments in resisting legislation introduced on the Hill for similar legislation.

d. No judge can ever be as fully briefed and understanding as can the Attorney General of the special need for wiretaps to collect foreign intelligence. Consequently, it must be assumed that overall collection in this area would be decreased.

e. On a purely practical basis there is a serious degradation of security if the courts become involved, since they are not trained and obviously persons other than the judge inevitably will handle the written records, thereby increasing the security risks in this most sensitive area.

f. The DCI has a positive duty to prevent erosion of capability and degradation of security in one of the most fruitful areas of the collection of positive foreign intelligence.

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N S. WARNER
neral Counsel

GEORGE L. CARY
Legislative Counsel

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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

76-6929
10 Feb 76

FROM:	EXTENSION	NO.
General Counsel		25X1
		DATE 10 February 1976

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. Legislative Counsel		✓		3. Attached is my paper, joined in by George Cary, on the issue of Administration legislation on electronic surveillance. We should know your position before you leave for California for use with the White House.
2.				
3. The Director			Noted by DCI 2/11/76	
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John S. Warner
General Counsel

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TRANSMITTAL SLIP	17 February 1976

TO: Executive Registry

ROOM NO.	BUILDING

REMARKS:

This documents was hand carried to the Director and back to OGC. Attached is a copy for your files.

FROM:

ROOM NO.	BUILDING	EXTENSION
7D07	Hqs.	

FORM NO. 241 1 FEB 55 REPLACES FORM 36-8 WHICH MAY BE USED. (47)

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