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THE WHITE HOUSE
WASHINGTON

Jim Connor requested that we ask
Phil Buchen is if he needs any further
guidance. Eva is checking.

No reply received

THE WHITE HOUSE
WASHINGTON

DECISION

February 13, 1976

MEMORANDUM FOR: THE PRESIDENT
FROM: PHILIP BUCHEN *P.*
SUBJECT: Intelligence Legislation Proposed
by the Justice Department

BACKGROUND

Ed Levi has submitted three proposed bills for your consideration concerning the Intelligence Community. He recommends that they be submitted along with your intelligence "package." They cover the following:

- . Assassination: Ed Levi has endorsed the bill prohibiting assassinations developed by the Senate Select Committee and introduced at the time they submitted their assassination report. The Senate bill is generally acceptable except for an ambiguity which could prohibit paramilitary or insurgent operations in which opponents of U.S. supported groups might be killed. A language change could solve this problem but it is unclear how receptive Congress might be to our proposed changes.
- . Electronic Surveillance: This bill drafted by Justice would establish a procedure for undertaking electronic surveillance for foreign intelligence purposes. It would create a special procedure for seeking a judicial warrant authorizing the use of electronic surveillance for foreign intelligence purposes. The bill would apply only to the interception of wire and oral communications to or from persons in the United

States and of radio communications both transmitted and received within the United States. It would therefore not cover NSA's operations. In this connection, Senators Kennedy and Scott are planning to introduce their own "bipartisan" bill on this subject next week; their bill is unacceptable to the Justice Department.

- . Mail Openings: This bill establishes procedures similar to those proposed by the Justice Department for electronic surveillance. It would establish a special warrant procedure authorizing the opening of mail for counterintelligence purposes only where there is probable cause to believe that the sender or recipient is an agent of a foreign power who is engaged in spying, sabotage or terrorist activities.

AGENCY REACTIONS

There is general agreement that you should endorse the Senate assassination bill or a modified version thereof. A question exists as to whether you should propose specific new language to correct the ambiguity discussed above or merely rely on legislative history to resolve the problem. The Senate may be suspicious of clarifying language proposed by the executive branch, although such proposed changes would be considered by the Judiciary Committee which would be more likely to accept changes than the Church Committee.

Agencies have identified several problems with the mail opening bill:

(1) Although it purports to allow mail opening for "foreign intelligence" purposes, it allows opening only for the collection of counterintelligence. As a result, it may implicitly limit whatever constitutional authority the President may have to open mail for foreign intelligence purposes.

(2) It would allow warrants to be framed much less specifically than traditional criminal warrants, when most activities justifying the new type of warrants would also constitute crimes ("spying, sabotage, or terrorist activities pursuant to the direction of a foreign government or foreign terrorist group").

(3) An important operative term, "spying", is undefined.

There are strong objections within the Administration to any electronic surveillance bill being proposed by you at this time. The objections are:

(1) An Administration bill would not be approved by Congress during its present session or would become so extensively amended as to make it unacceptable to the Administration.

(2) The bill as drafted omits covering critical NSA activities which do not lend themselves to a warrant procedure on a target-by-target basis; and Congress might attempt to overcome this omission by unworkable provisions.

(3) The bill unnecessarily derogates from the inherent Constitutional authority of the President to conduct warrantless electronic surveillance for foreign intelligence purposes. (Note: The Attorney General totally disagrees with this argument.)

The Attorney General, on the other hand, is strongly of these views:

(1) Certain committees of Congress will move ahead with their own proposals to control electronic surveillance for foreign intelligence purposes, and only by submitting an Administration proposal can we effectively counter objectionable moves by Congress.

Senators Ted Kennedy and Hugh Scott are likely to introduce their own bill. (Note: It may be referred to Senator McClellan's Judiciary subcommittee.)

(2) A specific statutory basis for electronic surveillance to collect foreign intelligence information under a procedure for obtaining special judicial warrants is advisable in view of the growing possibility that the Supreme Court will ultimately require judicial warrants for this type of activity under judicially-devised procedures and tests which will prove not to be nearly as workable as those set out in the proposed bill.

(3) Such legislation will overcome the erroneous public suspicion that covert and indiscriminate electronic surveillance abounds within the United States.

(4) Supplementary legislation to deal with NSA activities is in process and can be ready in time to deal with objections that the bill presently proposed by the Justice Department does not deal with such activities.

See Tab A for additional personal views from Ed Levi.

DECISIONS

1. With respect to the anti-assassination bill, there are three options:

(a) Endorse the Senate Select Committee draft bill when you announce your Community decisions.

Favor: Justice, Buchen

Approve _____ Disapprove _____

(b) Endorse the principle of the Senate Select Committee bill but say work must be done to correct its deficiencies.

Favor: CIA, State, Marsh, Scowcroft

Approve _____ Disapprove _____

(c) Announce that the Administration is considering an anti-assassination criminal statute, but do not endorse the Senate Select Committee Bill.

Favor: Defense

Approve _____ Disapprove _____

2. Submit mail opening legislation (or a slightly modified version thereof) with your Intelligence Community decisions.

Favor: Justice, State, Buchen, Scowcroft

Oppose: CIA (opposes such legislation for its purposes) and Defense

Approve _____ Disapprove _____

3. Submit electronic surveillance legislation when you announce your Intelligence Community decisions.

Favor: Justice, Buchen

Oppose: Defense, CIA, State, Scowcroft

Approve _____ Disapprove _____

If you submit no electronic surveillance legislation, there are two other options available:

- (a) Support the concept of such legislation, and announce that you will meet with Congressional leaders on the subject.

Favor: Justice

Approve _____ Disapprove _____

- (b) Take no position at this time.

Favor: Defense, State, CIA, Marsh, Scowcroft

Approve _____ Disapprove _____

The only real choice the President has is to be openly for or against legislation. Legislation is coming, and our best belief is that with Kennedy and Scott joined, a bill will be reported out by the Senate Judiciary Committee. The President will be in an awkward position to oppose, and in a much better position if the President has taken an affirmative position on, desirable legislation.

If the Executive does not support such legislation, this will weaken the position of the government in future cases where we will have to argue that warrantless surveillance is necessary because there is no other workable procedure.

There is a real danger that the Supreme Court will continue not to act, and lower courts in cases such as Zweibon will cast doubt on the legality of warrantless surveillance or intrusions for the placing of microphones.

The step by the President in asking for special legislation and a warrant procedure will be reassuring and an appropriate step in Presidential leadership.

The Attorney General

THE WHITE HOUSE

WASHINGTON

February 13, 1976



MEMORANDUM FOR: THE PRESIDENT

FROM:

JACK MARSH 

In your meeting with the Attorney General this morning, I expect he will bring up the question of electronic surveillance for foreign intelligence purposes. Justice would like the Administration to sponsor legislation on this subject.

This is an extremely divisive and controversial subject on which Defense, State and CIA have taken a position against Justice. However, there is division within some of the Departments on this question with strong arguments for both sides that can be made either way.

On Monday you have the final meeting with the principals on the intelligence matter and it is important that the electronic surveillance matter be resolved before the Monday meeting, otherwise it could precipitate a heated debate that may frustrate the purpose of the meeting.