OPTIONAL FORM NO. 10
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UNITED STATES GOVERNMENT

Memorandum

TO : DISTRIBUTION

DATE: 4 April 1977
[redacted] U1, 5047s

FROM : ADLA

(b)(3)-P.L. 86-36

SUBJECT: Foreign Intelligence Surveillance Act

1. On Friday, 1 April, Department of Justice indicated that it had reconsidered the question of whether certain activities should be authorized by the Foreign Intelligence Surveillance Act. Justice indicated it would adopt the NSA position, but would modify the language to include certain FBI activities. Justice provided the attached draft language and requested comments or concurrence by COB, 4 April.

2. There are at least three basic problems with the Justice draft. First, the use of "any information" in the definition of electronic surveillance appears unnecessarily broad and could be extended to non-human intelligible signals and images. Second, the standard of "a warrant would be constitutionally required if the surveillance were not to acquire foreign intelligence information..." appears to be a rather ambiguous and vague standard where civil penalties are involved. Various circuit courts do not currently agree as to when a warrant is required and one circuit, D.C., appears to be on the verge of requiring a warrant for foreign intelligence surveillances. Third, the definition of foreign intelligence information as it relates to foreign countries still appears to set an unnecessarily high standard, "essential to the national defense or conduct of foreign affairs..." The use of "necessary" as the standard would appear more appropriate.

3. The new draft is, however, a step in the right direction. Your review and comments are requested by 3:00 p.m., 4 April. Comments should be provided to GC for consolidation.

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ADLA

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Approved for Release by NSA on 08-24-2010, FOIA Case # 60938

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Delete § 2521(b)(6)(A) - (D) and insert in lieu thereof:

"Electronic surveillance means the purposeful acquisition by an electronic, mechanical, or other surveillance device of any information within the United States or any communication within, to, or from the United States, under circumstances in which a warrant would be constitutionally required if the surveillance were not to acquire foreign intelligence information."

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In § 2522 insert the following:

"(a) The President may authorize electronic surveillance to acquire foreign intelligence information without a court order under this chapter whenever the surveillance is directed at any foreign power or non-United States person, who is either an agent of a foreign power or not in the United States, for the purpose of obtaining foreign intelligence information concerning a foreign power or such a non-United States person, provided that any such surveillance shall be conducted in accord with minimization procedures approved by the Attorney General and reported to the Senate Intelligence Committee and such committee of the House as the Speaker may choose."

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Make current subsection (a) subsection "(b)" and current subsection (b) subsection "(c)".