

THE WHITE HOUSE

WASHINGTON

TALKING POINTS

MEETING: March 12, 1976, at 10:30 a.m. in
White House Situation Room

SUBJECT: Legislation on Electronic Surveillance
for Foreign Intelligence Purposes

1. Requirement of warrant for surveillance of.....
.....

(a) Pros:

(i) Avoids likelihood that in absence of
legislation, courts will eventually
decide a warrant is required in such
cases.

(ii) Eliminates question of validity of
evidence obtained

(iii) Protects cooperating communications
carriers and landlords and protects
against charges of criminal trespasses
when otherwise communications carriers
can decline cooperation and render
surveillance impossible. (One carrier
has already declined such cooperation.)

(iv) Avoids having legislation which is
designed solely to permit.....
.....when such activities are
relatively a minor portion of the
electronic surveillance program and
key members of the Senate Judiciary
Committee want the legislation to
include.....surveillance.

(v) The stated tests for obtaining a
warrant are not of a kind which will
materially inhibit surveillance of
these kinds of targets.

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E.O. 12958 Sec. 1.5 (A)

MR 94-152, #62, NSC LHM 9/8/98

By WT, NARA, Date 6/2000

(b) Cons:

- (i) Unnecessarily requires resort to the judiciary for exercise of an inherent Executive power, especially in cases where only communications of are involved.
- (ii) Makes warrants mandatory even in the area of communications that are not of significant concern to the Congress, when warrants in cases might better be made optional in the discretion of the Executive.
- (iii) Could result in troublesome delays or even a denial of authority in particular cases.

2. Requirement for information sought to be that "which because of its importance is deemed essential to the security or national defense of the Nation or to the conduct of the foreign affairs of the United States."

(a) Pros:

- (i) Test is not materially inhibiting because meeting the test depends on the judgment of knowledgeable Executive officials and relates to their reasonable expectations of what information may result from the planned surveillance.....
- (ii) Committee report will indicate that "importance" is the controlling word.
- (iii) Any lesser test will not be acceptable to members of Congress whose support is needed to obtain passage of the legislation; and it might result in a successful court challenge of the legislation

(b) Cons:

(i) "Essential" rather than "importance" appears to be the controlling word in the test, notwithstanding what the Committee report may say.

(ii) While the legislation appears to contemplate no second-guessing by a Judge on whether the test has been met, it is still possible that a Judge on learning the identity of a particular target might question whether it could possibly have been met.

3. Failure to include

(a) Pros:

(i) The included words
.....
fit within the purposes of the legislation.

(ii) Senate Judiciary Committee wants to avoid singling out for special mention

(b) Cons:

(i) Without a straightforward reference an ambiguity exists that is better over- come directly than by reliance on legislative history.