THE WHITE HOUSE

WASHINGTON

November 5, 1985

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony on Death Penalty Legislation

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

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Subject: DOJ testimony re death penalty legislation

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 1, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO:

Department of the Treasury - Carole Toth (566-8523)
Department of State - Lee Ann Berkenbile (632-0430)
Department of Defense - Werner Windus (697-1305)
Central Intelligence Agency

SUBJECT: Department of Justice testimony on death penalty legislation.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than 10:00 a.m. -- 11/5/85.

Direct your questions to Gregory Jones **(395-3454), the legislative attorney in this office.**

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Fred Fielding
Karen Wilson
Frank Kalder
John Cooney

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

DEATH PENALTY LEGISLATION

ON

NOVEMBER 7, 1985

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice and of the Administration on reestablishing constitutional procedures for the imposition of capital punishment for certain especially heinous federal crimes. Our position is simply stated: We strongly support the death penalty for a narrowly limited class of federal crimes for which there is no other appropriate punishment. Consequently we strongly support the enactment of legislation that will allow the consideration and imposition of the sentence of death under constitutionally permissible procedures and criteria. In fact, the Administration regards the passage of such legislation as one of its highest priorities in the criminal justice area.

The reinstitution of the death penalty is long overdue as a possible punishment for certain especially serious federal offenses. From the earliest days of our country, the death penalty was part of our criminal justice system. It allowed society to exact a just punishment from the most dangerous and vicious criminals, and it no doubt deterred countless crimes. Not so long ago, a person who kidnapped and murdered a young child, or a spy who sold our country's most important secrets to a hostile government knew pretty well the price he or she would pay if caught: because of the seriousness of the offense, and in accordance with the views of the overwhelming majority of our citizens, the punishment would be death.

Then in 1972, the Supreme Court decided the well known case of Furman v. Georgia. [1/] That decision, in effect, made many of the death penalty provisions in state and federal law inoperative by holding that the unlimited discretion as to whether or not to impose this punishment given judges and juries under many statutes then in effect caused the death penalty to be imposed so arbitrarily and capriciously as to constitute cruel and unusual punishment under the Eighth Amendment.

However, following Furman, the Supreme Court considered a number of state death penalty statutes and provided guidance as to what procedures are constitutionally mandated for the imposition of this punishment. [2/] In these cases the Court has clearly held that the death penalty is a constitutionally permitted sanction if imposed under certain procedures and criteria which guard against the unfettered discretion condemned in Furman. Therefore, it cannot be said that the death penalty is cruel and unusual punishment. Those who try to argue that it is simply do not know the law on this subject as set down by the highest judicial authority in this country.

Mr. Chairman, after the Furman case, 38 states revised their laws to provide for the death penalty under the requirements of

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1/ 408 U.S. 238.

2/ Particularly notable in this series of cases was a group of landmark decisions all handed down on the same day in 1976 -- Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280; and Roberts v. Louisiana, 428 U.S. 325.

that decision and of the others of the Supreme Court which followed it. In other words, just over 75% of the states have concluded that the death penalty should be available as a punishment for certain offenses. But the federal government lags behind. Incredibly, the maximum punishment that can be imposed by a federal court for the murder of the President, of a Member of Congress, or of an ordinary citizen committed on some federal property is less than could be imposed by most state courts if they had jurisdiction or were free to exercise it. 3/

Until very recently, most persons thought of the types of murder that I have just described as the primary offense for which the death penalty should be available as a possible punishment. Indeed, the death penalty should be available for first degree murder whenever there is federal jurisdiction over the offense. During the last year, however, we have seen appalling incidents of espionage in which it has been alleged -- and in a number of cases already proven -- that military officers and others who enjoyed positions of special trust and responsibility have sold our country's secrets to foreign powers. The incalculable harm caused by these offenses -- crimes that may have impaired our country's ability to defend itself against a

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3/ While in theory, a state could prosecute a person for assassinating the President or a Member of Congress, the assertion of federal jurisdiction over these uniquely federal crimes ousts the state of jurisdiction. See 18 U.S.C. 351(f) and 1751(h). Certain federal properties, like a number of military bases and prisons, are areas of exclusive federal jurisdiction on which the laws of the states do not apply.

nuclear attack -- should underscore the necessity of having an enforceable death penalty available for espionage cases resulting in particularly serious breaches of national security as well as for first degree murder.

Mr. Chairman, we realize that the death penalty is controversial in some quarters. We know that some persons believe that society is not justified in taking a person's life, no matter how despicable his crime, no matter how much suffering he or she has caused, and no matter how much of a danger he poses to the community. Let me state emphatically that this Administration does not share that point of view.

First, common sense tells us that the death penalty operates as an effective deterrent for crimes involving planning and calculation. Espionage is a good example of such a crime. Presidential assassination is another. Second, and just as important, society has a right, as the Supreme Court has repeatedly reaffirmed, to exact a just punishment on those individuals who deliberately flout its laws in a particularly harmful and dangerous way. For some offenses, death is the only just punishment. We firmly believe that civilized society has a right if not a duty to rid itself permanently of those individuals who have been found to have committed certain carefully described but especially harmful offenses in an especially aggravated manner.

Consequently, we support legislation that would do two things: First, it should cover all the offenses in the federal code for which the punishment could extend to death. Second, it should set out the procedures to be followed in those cases in

which the government seeks the death penalty. We believe that federal legislation should carefully reflect all the requirements for the imposition of this punishment as they have been set out by the Supreme Court in the cases to which I referred earlier.

Specifically, in cases in which the government seeks the death penalty, there should, of course, be ample notice to the defendant in advance of trial. Then, if he or she is convicted, there should be a special post-verdict sentencing hearing at which the government may introduce evidence of aggravating factors and the defendant may introduce evidence of mitigating factors. For defendants convicted of first degree murder, for example, the government should be allowed to introduce such matters in aggravation as that the murder was for hire or was committed in an especially heinous, cruel, or depraved manner such as by sustained torture. As matters in mitigation, the defendant should be allowed to introduce such matters as the fact that he was extremely young at the time of the offense, was under unusual duress (although not to such a degree as to constitute a defense to the charge), or that he was a relatively minor participant in the crime, although still punishable as a principal. The defendant also should specifically be allowed to introduce evidence of any other mitigating factors not set out in the statute.

Following the introduction of this evidence, and argument by the government and the defense, the finder of fact at the sentencing hearing should determine first if any aggravating factors have been proven beyond a reasonable doubt. If no aggravating

factors are found, the death penalty should not be imposed. If however, one or more aggravating factors are found, the fact-finder should consider whether any mitigating factors have been established by a preponderance of the evidence. Then, the fact-finder should decide, by unanimous vote, if any aggravating factors found outweigh any mitigating factors, or if no mitigating factors are found whether any aggravating factor or factors alone justify the imposition of death.

In cases where the jury is sitting as the fact-finder at the sentencing hearing, the court should specifically instruct the jurors that in its consideration of whether the punishment of death is justified, it shall not consider the race, color, national origin, creed or sex of the defendant. Each juror should also be required individually to sign a certificate attesting to the fact that he or she did not consider these factors in reaching his or her decision.

Mr. Chairman, I know that a number of bills providing for the reinstitution of capital punishment have been referred to this Subcommittee. Of those, H.R. 343, introduced by Congressman Gekas, and others, represents the type of legislation which the Department supports. It is closely patterned after bills that the Department has drafted and includes the type of post-conviction sentencing hearing I just described. It is also a comprehensive bill in that it provides for capital punishment for

most of the offenses where this punishment is warranted. 4/ We strongly urge that this type of comprehensive approach be adopted. In this regard, we can understand the introduction of bills that provide for capital punishment for only a certain type of offense, such as for espionage or for murder during a hostage taking. Nevertheless, the death penalty is appropriate for such a limited number of federal offenses that we think there should

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4/ These offenses are treason, espionage, aircraft destruction resulting in death, offenses involving the misuse of explosives resulting in death, first degree murder of federal officials or a family member of such an official, first degree murder in the special maritime and territorial jurisdiction, first degree murder of a foreign official, mailing particularly dangerous articles such as poison that results in death, murder during the course of a kidnapping, Presidential assassination, attempted Presidential assassination that comes dangerously close to succeeding, train wrecking resulting in death, and aircraft piracy resulting in death.

With the exception of the kidnapping offense resulting in death and attempted Presidential assassination, these offenses all provide for the death penalty already but, as discussed, the death penalty cannot be imposed because of constitutional procedural problems. The kidnapping statute also provided for the death penalty in cases where death resulted until 1972 when, as part of broader legislation enacted shortly after the Furman decision, the death penalty provision was deleted. See P.L. 92-539. With regard to a Presidential assassination attempt that nearly succeeds, this offense is a unique crime which can cause enormous harm and for which the death penalty should clearly be authorized.

We also recommend that the death penalty be authorized as a possible punishment for murder committed by persons serving a life sentence in a federal correctional institution, which would require the creation of a new offense in title 18, and for the offenses of murder resulting in death under 18 U.S.C. 1952A, murder committed in aid of racketeering activity under 18 U.S.C. 1952B, and for a hostage taking resulting in death under 18 U.S.C. 1203. The recent murder of an elderly United States citizen held hostage by terrorists on the Achille Lauro has vividly demonstrated the need for the death penalty for this particularly despicable offense.

be established uniform procedures for the consideration of whether this punishment should be imposed that would apply to all such cases.

Before concluding, Mr. Chairman, let me urge this Subcommittee to consider and quickly report out a comprehensive death penalty bill. This is not a new or novel question nor is it one on which the American people one closely divided. As I have mentioned, over 75% of the states already provide for capital punishment. In the last Congress, when the Senate passed S. 1765, a bill quite similar to H.R. 343, it was favored by 74% of the Senators present and voting. The vote was 63-22. Polls indicate that at least that high a percentage of the American people favor capital punishment.

Ordinarily, we in the Executive Branch do not concern ourselves with procedural matters of the Congress. But this is such a basic and significant issue to the federal justice system that we cannot ignore the fact that a petition has been filed to discharge the Judiciary Committee from responsibility for its consideration and secure its consideration by the entire House. If the Committee continues its policy in recent years of not permitting a capital punishment bill to be debated and voted by the full House, we believe the extraordinary remedy of a discharge petition is indeed warranted so that the matter can be resolved by a vote of the full House. The American people deserve nothing less.

Mr. Chairman, that concludes my testimony and I will be happy to answer questions at this time.

THE WHITE HOUSE

WASHINGTON

November 12, 1985

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Electronic Communications Privacy Act of 1985

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective.

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ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1985

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear here today to discuss S.1667, the Electronic Communications Privacy Act of 1985.

The proposed legislation is directed primarily at amending Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to provide coverage of the many new technologies in the area of communications and electronic surveillance that were not available when the original act was passed in 1968.

In addition, the proposed legislation provides for more comprehensive judicial supervision of investigative methods related to electronic surveillance heretofore not within the proscriptions of Title III. We have serious concerns about many of the provisions of this bill which could unnecessarily complicate procedures without enhancing individual rights of privacy. An in depth review of the proposed legislation is presently being conducted by several Department of Justice components whose activities would be affected by this bill. Because of the complexity of this type of legislation that analysis has not yet been completed. The President's Commission on Organized Crime is also in the process of evaluating the

effectiveness of Title III and it is my understanding that the Commission will be making recommendations relative to the effectiveness of the statute in the near future. So rather than addressing the specific language of the bill, I will limit myself to making a number of general comments and observations about certain proposals in the legislation.

Initially, I would note that Title III electronic surveillance is an extremely valuable and effective law enforcement tool. Its value was proved recently by a survey taken by the Criminal Division's Office of Enforcement Operations to test the results of court ordered electronic surveillance in FY 83. That year was chosen to give sufficient time for investigations to be completed and most trials to be over. We chose, at random, 51 investigations which with related wiretap authorizations, covered 35% of the total of new Title III authorizations for that year. All reports are still not complete, but our figures indicate that convictions, indictments and ongoing investigations in which indictments are expected have occurred in 45 of the 51 investigations which is a rate of 88%. In addition, in just 38 completed investigations, convictions of those originally named as interceptees or others later found to have been involved in the investigation total 467 or an average of almost 13 convictions per completed investigation. Currently another 64 individuals are under indictment in the remainder of the open investigations and a good number of further indictments

are expected in those investigations that still have not reached the indictment stage.

We believe these figures, which we continue to amass and analyze, show the great effectiveness of Title III as a law enforcement tool. We must also stress that there is no record of abuse of electronic surveillance and that the rate of suppression of evidence obtained by means of electronic surveillance for any reason is minuscule.

As you know, the current laws governing interception of communications are complex and attempt to strike a balance between legitimate privacy concerns and the responsibility of federal officials to arrest and prosecute criminals. While we in the Department of Justice are mindful of the privacy rights of our citizens, we think it is equally necessary to recognize the importance of court-ordered interceptions of communications in investigating major crimes. In the Department's judgment, Title III of the Omnibus Crime Control and Safe Streets Act as presently constituted, has succeeded in providing an appropriate balance between the citizen's right to privacy and the law enforcement and societal interest in preventing crime and apprehending criminals. The statute has proven itself amenable to application to a number of new technologies although certainly not to all that have been developed. In addition, since the enactment of the statute in 1968, a substantial body of case law has developed which establishes well defined limits on how the statute is to be used and how it is to be interpreted.

Relative to any assessment of the statute in terms of proposed amendments to address technological developments, care must be taken not to impair this existing and by now well understood statutory structure.

Moreover, before bringing certain investigative aids under judicial supervision, as the proposed bill does, great care must be taken to balance new impediments to important and well established investigative techniques against the degree of intrusion involved. In our view, judicial supervision is required when the degree of intrusion is such that it infringes upon an individual's reasonable expectation of privacy. This, of course, is the principle embodied in Title III and in the Supreme Court's decisions interpreting the fourth amendment.

The Department of Justice does agree that the electronic surveillance provisions of Title III should be re-evaluated periodically to ensure that the statute keeps pace with developing technology. Our policy is to propose amendments to the statute and to support those amendments proposed in Congress whenever our experience and continuing review of the statute warrant such action. At the present time, we recognize that certain modifications due to the rapidly changing technology of electronic communication may be necessary and we feel that some of the amendments proposed in S.1667 address this need. We would stress, however, that a great deal of further analysis and

discussion is required before the implications of the new technology are fully understood.

Although the Department believes that all forms of conventional telephones as well as many of the newer technologies are currently covered by Title III because the transmission is at least in part by wire, there may be a need to amend the statute to specifically cover those types of telephones, like cellular telephones and certain forms of cordless telephones, where the communication is transmitted partly by means of radio. The radio portion of the transmission is either analog (regular voice transmission), digitized, or encrypted in some other fashion. The analog transmission would readily be subject to interception by an ordinary citizen with a standard AM/FM radio receiver by tuning to certain frequencies. Digitized or otherwise encrypted transmissions would require specialized equipment to turn the conversation back into analog form. In amending the statute to cover these new forms of telephones, a decision has to be made as to whether all communications should be covered including analog conversations when transmitted as radio communication. If so, would an ordinary citizen who intercepts it be subject to criminal or civil liability? Should there be a reasonable expectation of privacy where the call is so suspectible to interception? In the alternative, should amendments to the statute respecting these types of telephones only be extended to the radio portions of the communications that are digitized or encrypted in some other manner where additional technical steps

must be taken to turn the digitized communication back into analog form so it could be understood?

The Department has not yet formulated a policy on whether only a digitized or otherwise encrypted conversation should be subject to the protection of the statute. It could be argued that the additional protection for the call by digitizing or otherwise encrypting it would evince a clear intent that there is a reasonable expection of privacy. In this scenario, the citizen who either voluntarily or involuntarily intercepts the analog call would be free of criminal or civil liability. Obviously, so too should law enforcement personnel. These are questions that have to be looked at carefully before definitive recommendations can be made.

Second, with respect to the legislation's attempt to bring within the proscriptions of Title III the newer types of non-aural transmissions such as computer transmissions and electronic mail, it is our current belief that with respect to authorization for the government to seize the contents of these transmissions, they are covered by an ordinary search warrant process based on probable cause pursuant to Rule 41 of the Federal Rules of Criminal Procedure. For example, if the government presently wishes to intercept a letter posted with the Postal Service, a search warrant under Rule 41 is procured. The Department believes that electronic mail is entitled to no greater protection than regular mail. Including these transmissions in

Title III would, in effect, be adding an entire new scope to the existing statute. Had Congress intended that in 1968, it would have added non-aural communications such as ordinary mail in the statute at that time. The Department feels that changing the entire thrust of Title III is not warranted at this time and that intercepting this type of non-aural communication by private individuals could better be handled by separate legislation. The safeguards regulating government interception at this time are adequately covered by Rule 41 of the Federal Rules of Criminal Procedure. A similar analysis appears appropriate for computer transmissions.

Third, video surveillance is a relatively new investigative tool. Two different types of situations must be considered when trying to legislate controls over this technology. The first is the situation where the government is conducting video surveillance of an individual or a premises where there is a reasonable expectation of privacy. The second type of video surveillance is where a closed circuit video transmission is intercepted by either the government or an individual.

The most common type of situation that arises with respect to government activity is the surveillance of an individual or a premises where there is a reasonable expectation of privacy. Under present case precedent, the government would secure an order in the nature of a search warrant under Rule 41 of the Federal Rules of Criminal Procedure where there is only video

surveillance, assuming the video surveillance involves a reasonable expectation of privacy. If there is to be any audio interception then a separate Title III authorization is procured. Under this procedure the rights of the citizen are adequately safeguarded. Adding the video surveillance to Title III would again be adding an entire new scope to the statute. The Department sees no need for that at this time. We would have no objection to authorizing courts to approve a continued video and audio surveillance in a single Title III order.

Considering the scenario where a closed circuit television transmission between two individuals would be intercepted, it is highly unlikely that such a transmission would take place without an audio portion relaying information on the image. Where the audio transmission is present, Title III adequately covers the communication. Interception of the video portion alone by government agents would be covered by Rule 41 so the only difficulty arises where the video transmission (with no audio accompanist) is conducted by someone other than a law enforcement officer. This very rare situation could be covered in the same type of legislation that could regulate computer hacking without disturbing the purpose and intent of Title III.

OBJECTIONS TO THE LEGISLATION

With respect to S.1667, the Department has serious objections to several of the bill's other provisions in the areas involving those investigative techniques somewhat related to Title III but not presently within the coverage of that statute. The thrust of these provisions is to take investigative techniques that do not approach the level of intrusion involved in the actual interception of the contents of communications accomplished by full scale electronic surveillance and elevate them virtually to the same level. The result will be a severe hindrance to law enforcement in using non-intrusive techniques to combat drug trafficking, organized crime, and terrorism.

PAGING DEVICES

Although not specifically delineated in the proposed legislation, the new definitions would include paging devices under the proscriptions of the revised Title III.

There are presently three types of such devices. The first type, the tone only pager, only transmits a beeping sound to the handset carried by the subscriber. No message of any type is transmitted and it is the Department's position that interception

of the beep does not constitute a search and should not be regulated under the statute. The second type, the digital beeper, transmits digitized numbers and arguably a "message" could be transmitted by using numbers. Present practice is to procure an order under Rule 41 of the Federal Rules of Criminal Procedure based on probable cause to intercept this type of communication. Since no aural message is transmitted, it is the Department's position that presently Title III does not apply to this type of paging device. The third type of paging device, the voice pager, does in fact transmit an aural message and present practice is to secure an interception order under Title III before this type of message is intercepted.

It is the Department's position that present standards balance the rights of the individual with the interests of law enforcement and that new legislation should not escalate the levels of judicial supervision for the utilization of these devices over present standards. The third type of paging device should appropriately remain under Title III, while the second type should continue to be regulated by Rule 41 of the Federal Rules of Criminal Procedure. The first type which transmits a beep only should not be subject to judicial supervision because of the de minimus level of intrusion.

The Department has no objection to codifying existing standards but would object to increased levels of supervision as

imposing an undue burden on the use of the devices by law enforcement agents.

PEN REGISTERS AND LOCATION DETECTION DEVICES (TRACKING DEVICES)

S.1667 would amend Title 18 of the United States Code to add a new chapter bringing the use of pen registers and location detection devices (tracking devices) under increased judicial supervision. It is the Department's position that this change would create serious problems in the law enforcement program that has developed under Title III.

PEN REGISTERS

Pen registers are attached to telephones only for the purpose of identifying and recording dialed numbers. Their use does not infringe on any constitutionally protected interest and that has clearly and definitively been decided by the Supreme Court. Smith v. Maryland, 442 U.S. 735 (1979). Pen registers have proven to be a valuable tool in criminal investigations, especially those involving drug trafficking, organized crime activities and money laundering where perpetrators frequently use the telephone to communicate. The pen register enables the investigators to establish a pattern of communication between suspects. It never permits access to the contents of a conversa-

tion. It is currently the practice of the Department to secure court orders authorizing the use of pen registers pursuant to Rule 57 of the Federal Rules of Criminal Procedure. Assistant United States Attorneys in the field may secure these orders, without the review of senior Department officials, upon a representation to the court that such information is relevant to an ongoing criminal investigation. In as much as this procedure does not require a showing of "probable cause" to obtain the order, pen registers have proven especially effective at the earlier stages of investigations when the primary objectives are identifying the participants and determining their relationship in the alleged criminal activity. In many instances, the results of the pen registers are then used to develop the more detailed showing of "probable cause" necessary to obtain Title III orders authorizing the far more intrusive interception of wire and oral communications.

Bringing the use of pen registers within increased judicial supervision would limit their use and would impose many of Title III's elaborate procedures. Consequently, the use of pen registers would significantly decline to the detriment of criminal investigations and ultimately the prosecutions themselves. Given that pen registers, by comparison to the interception of communications, constitute a minimal intrusion

into the privacy interests of targeted subjects, it is the Department's view that it is unnecessary and inappropriate to increase judicial supervision over their use.

Granted that no communications are intercepted and that the courts have held that there is no constitutional or statutory requirement for court supervision of a pen register, the bill's elaborate notification and reporting requirements would create an unnecessary burden on law enforcement resources that would not be balanced by an equal benefit to citizen rights of privacy.

LOCATION DETECTION DEVICES (TRACKING DEVICES)

Similarly, to include location detection devices (tracking devices) under Title III would adversely impact on law enforcement efforts. In most instances the use of location detection devices (tracking devices) like pen registers, invades no constitutionally protected interests. E.g., United States v. Knotts, 460 U.S. 276 (1983). Such devices never reveal the content of any conversation. In those cases in which the installation or monitoring of location detection devices (tracking devices) would invade a subject's reasonable expectation of privacy, e.g. United States v. Karo, 104 S. Ct. 3296 (1984), court orders, pursuant to a showing of "probable cause"

are sought under Rule 41 of the Federal Rules of Criminal Procedure. In these instances as well, however, review and approval of the applications by senior Department officials is not required.

Like pen registers, location detection devices (tracking devices) have proven to be an effective and often vital investigative tool, especially in drug investigations where they are used to track shipments of contraband and vehicles that transport those shipments. Their use often eliminates the need to commit substantial resources required for "moving" physical surveillance. The practical effect of subjecting the use of location detection devices (tracking devices) to increased judicial and administrative supervision would be to narrow severely the circumstances in which they could be effectively utilized. In as much as location detection devices (tracking devices) like pen registers, very rarely involve any infringement into the privacy interests of the subject, it is unnecessary to impose upon their use the stringent controls and reporting requirements.

In addition, the reporting requirements imposed by the legislation would cause serious difficulties in the ulitization of these procedures. The Department feels that the minimal

levels of intrusion involved in using these devices does not warrant significant reporting requirements.

TOLL RECORDS

The proposed bill has a provision that would add to Title 18 a new subsection 2511(4), which would require a court order for the government to obtain telephone toll records. Telephone toll records, like pen registers, will never reveal the contents of a conversation and invade no reasonable expectation of privacy. Even though the criteria required for securing the order under the bill -- reasonable suspicion that a person or entity by whom or to whom the communications were made has engaged, or is about to engage, in criminal conduct and that the records may contain information relevant to the conduct -- do not rise to the probable cause level required for securing an eavesdropping court order, the requirement nevertheless does impose a heavy procedural burden on law enforcement officials in an area that is minimally intrusive and has proven to be a highly effective law enforcement tool. It is the view of the Department of Justice that present procedures for securing this information by either an administrative subpoena from a law enforcement agency with such power or by way of a grand jury subpoena provide sufficient safeguards against the abuse of this process.

ADDITIONAL PROCEDURAL REQUIREMENTS

The additional requirements imposed by the proposed legislation relative to providing further specific information in the applications and the orders on a) investigative objectives and b) alternate investigative techniques are unnecessary and would be more burdensome. The statute and the case law that has developed clearly defines the parameters of what is necessary to obtain the order. The law is clear that electronic surveillance need not be the only remaining alternative as long as the court is satisfied that the other investigative methods are likely not to succeed or would be too dangerous. That showing must now be made before an order is issued. There is no basis in procedure or substantive case law in this area to justify changes in this well defined statute.

With respect to the proposed amendment to 18 U.S.C. 2518 (8)(a) that would change the wording of that portion of the statute which mandates presenting the recording tapes of the intercepted conversations to the judge "immediately" upon the expiration of the authorization to presenting the tape recordings "not later than 48 hours", the Department opposes that change. Case law has clearly defined that they should be presented as soon as possible but that, for good cause shown, the court can

excuse delays depending upon the situation. Current case law has given this discretion to the judge and legislating a specific time would be too limiting in practice and would require re-interpretation by the courts.

Finally, we wish to draw attention to the changes in the proposed level of culpability of a violator in both the criminal and civil areas. Section 2520 of Title 18 currently provides that a good faith reliance on a court order or legislative authorization is a complete defense to both civil and criminal actions brought under Title III or any other law. Section 103 of the proposed legislation, which is intended to replace Section 2520 of the current statute, provides that a good faith reliance on a court order or warrant is a complete defense to only a civil action. Thus, the implications of the proposed legislation are unclear as to the level of criminal liability of an agent who in the course of his or her duties inadvertently violates the law. To impose a vicarious liability is exceedingly harsh and would inhibit those involved in conducting legitimate investigations. The Department would like to see a good faith exception to both criminal and civil liability as well as a good faith exception to the exclusionary rule for presentation of evidence under appropriate circumstances.

AFFIRMATIVE RECOMMENDATIONS

The Department in its experience with the provisions of Title III has identified certain areas where affirmative amendments would greatly facilitate the law enforcement function.

The first of these areas is the extension of Title III authorization authority to interceptions of specified individuals wherever they may be as well as to places and facilities in line with the theory of Katz v. U.S. 389 U.S. 347, that the Fourth Amendment protects people not places. We realize this suggestion raises interesting and novel issues of a constitutional nature. We raise it to stimulate debate at this time in the hope that an appropriate vehicle can be drafted to permit this form of authorization.

We also recommend extending Title III authorization to cases involving bail jumping where the underlying offenses would have supported a Title III request and to prison escapes. We support the addition of the new offenses in Section 105 of the proposed legislation and would recommend adding air piracy to those offenses.

The Department favors the proposed provision of the bill that would authorize an Acting Assistant Attorney General in charge of the Criminal Division to sign Title III authorizations.

The Department endorses the proposed legislation's provisions that would authorize the use of mobile interception devices (p. 11 of the statute) and tracking devices (p.16 of the statute) across district lines where the order is procurred in the district of origin.

An amended statute should have a provision that the 30-day authorization period for a Title III should begin to run upon installation of the interception device and not on signing of the order.

In conclusion, the invented new technologies may warrant a re-examination of the scope and adequacy of existing Title III provisions now available. We feel that some additional study and review should be considered. Consideration should also be given to the changes that the Department has suggested. We would be pleased to work with the Subcommittee's staff in developing a bill that all can support.

Mr. Chairman, that concludes my prepared remarks and I would be happy to answer any questions at this time.

THE WHITE HOUSE

WASHINGTON

February 12, 1986

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony re: Miroslav Medvid

We have been provided a copy of proposed testimony by Roger Brandemuehl, Assistant Border Patrol Commissioner, on Miroslav Medvid. The testimony is purely factual, and accordingly we are in no position to comment on it.

ID # _____ CU

WHITE HOUSE
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Subject: Testimony re Miroslav Nedzid

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Assistant Attorney Genera.

PLEASE ADDRESS ANY QUESTIONS OR COMMENTS TO BRANDEN BLUM, OMB, 395-3454.

DRAFT

TESTIMONY ROGER P. BRANDEMUEHL

ASSISTANT COMMISSIONER, BORDER PATROL

Thank you Mr. Chairman, member of the Committee, I am pleased to be with you to discuss the case of the Soviet Crewman, Miroslav Medvid. My testimony focuses upon the reinterview of Mr. Medvid conducted by the Department of State and the Immigration and Naturalization Service.

On October 26, 1985, under the direction of Commissioner Alan C. Nelson, Mr. Ed O'Connor our Southern Regional Commissioner, and myself, were dispatched to New Orleans with the following mandate:

1. To assist the Department of State in the reinterview of Crewman Medvid.

2. To initiate an investigation surrounding the crewman's initial contact with this agency.

3. To formulate an operational plan to physically remove the subject from the vessel, if negotiations between the Soviet Embassy and the Department of State failed.

On October 28, 1985, as a result of diplomatic discussions between the Department of State and the Soviet Embassy in Washington, D.C., it was agreed that Seaman Medvid would be transferred from the M/V Konev to the United States Coast Guard Cutter Salvia for an interview in a neutral environment. The meeting was scheduled to occur at approximately 4:30 p.m. that date. Commissioner Nelson designated myself to be the Immigration representative as part of the interview team headed by Mr. Louis Sell, Department of State. The other members of the United States delegation were the interpreter and a United States Navy Physician. The Russian delegation consisted of subject, Medvid, the Captain of the M/V Konev, the ships doctor, and two officials from the Russian Embassy.

The United States interview team arrived on board the Cutter Salvia at approximately 4:30 p.m. with the Russian delegation arriving approximately 30 minutes later. We assembled in the cutter's wardroom and the interview of crewman Medvid commenced with Mr. Sells setting forth the ground rules. Mr. Sells would speak for the United States delegation, Mr. Bondin for the Soviet Delegation and the United States interpreter would be interpreting Mr. Medvid's response to questions asked by Mr. Sells.

During the introductions, ground rules, etc., subject (Medvid) appeared to be quite nervous. Within minutes, he stated he was nauseous and requested that he get some fresh air at which time the entire entourage moved out on deck. Subsequently, Medvid was brought back to a cabin and allowed to lie down where he was examined by the

United States doctor. Within 15-20 minutes Medvid stated he was ready to resume the interview and the group reconvened in the wardroom.

Mr. Sells proceeded to ask Medvid a series of questions surrounding the circumstances of his departure from his vessel the night of the 24th, what happened on shore and the events surrounding his being returned to his vessel.

In essence, subject never admitted that he deliberately jumped ship and would only state that he fell overboard. He was vague about what happened on shore and the sequence of events leading to his return to the vessel. Although he did not answer some of the questions concerning events of the past few days, he repeatedly stated he wanted to return to the Soviet Union.

Mr. Sells, very painstakingly, explained to Medvid that if he wanted to remain in the United States he could do so without fear of being incarcerated, punished, or having reprisals taken against him in any manner. In spite of these assurances, Medvid still stated he wanted to return to the USSR.

At approximately 9:30 p.m., after consulting with Washington, Mr. Sells advised the Russian delegation that the United States Government thought it prudent to move Medvid ashore where he could be further examined by our doctor and be given an opportunity of a good nights sleep.

The Russian delegation objected strenuously to this; however, when given an ultimatum either accompanying Medvid or being returned to the Soviet Vessel without Medvid, they chose the former.

At approximately 11:15 p.m., Seamen Medvid and the accompanying United States and Soviet representatives were transferred to a nearby Naval Facility. Upon arrival at the facility, Medvid was given a thorough medical examination and a psychological evaluation. He then retired for the evening.

The next morning after breakfast, Medvid participated in an extensive interview with a United States Air Force psychiatrist. At around 12 noon the United States and Russian representatives convened for a second interview of Seamen Medvid.

Mr. Sells basically asked the same series of questions as posed at the first interview and we in essence received the same answers with the noted change that Medvid was becoming increasingly more belligerent towards the United States delegation. Again, Mr. Sells deliberately and with great pains assured Medvid that if he elected to remain here he would not be subject to prosecution or forced to return to his ship or to the Soviet authorities.

Four times during this interview Medvid stated he wanted to return home to see his mother and father.