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U.S. Department of Justice

Office of Intelligence Policy and Review

Washington, D.C. 20530

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Dave -

Per your request.

Mark Evans

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FORM DOJ-383
OCT. 83

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**NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000**

Serial: GC/261/85
11 November 1985

**MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE
ATTN: Director, Legislative Reference Service**

**SUBJECT: H.R. 3378, The Electronic Communications Privacy
Act of 1985**

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DEPT. OF JUSTICE

(U) This responds to your legislative routing slip of 24 October 1985, subject as above, which requested comments on H. 3378. This bill would amend Title III of the Omnibus Crime Control and Safe Streets Act to clarify its applicability to modern communications technology and to protect computer data bases. The National Security Agency finds that this bill adequately addresses privacy interests and with one exception (discussed in paragraph 2) does not infringe on legitimate foreign intelligence and communications security interests of this Agency. We would recommend, however, several changes to bring the language of the bill into conformance with terminology generally accepted by the telecommunications, law enforcement and intelligence communities, as noted below. Additionally, we propose that an explicit exemption for communications security activities directed at certain radio communications be added.

1. (U) In Section 101 (a) (1) [definition of 'electronic communication'], insert "by a provider of an electronic communication service engaged in the transmission of interstate or foreign communications," in lieu of the clause "that affects interstate or foreign commerce." In this context, the word "affect" is ambiguous. The proposed change would bring the revised definition into closer agreement with the existing statute with respect to common carriers/providers of electronic communication service. That part of the statute has been subjected to extensive judicial review and commentary and has merit.

2. (U) Propose that the phrase, "provider of electronic communication service" be defined. It is unclear, for example, whether that term includes a government agency or corporation which provides a telephone system for the use of its employees.

3. (U) In Section 101 (a) (2), we agree that the word "aural" should be deleted in the phrase "aural acquisition" but suggest the word "acquisition" remain rather than replacing it with the word "interception." This change, in lieu of the substitution of "interception", would bring this statute in closer conformance with the Foreign Intelligence Surveillance Act. Such conformance would promote consistent development and interpretation of electronic surveillance law.

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4. (U) In Section 101 (b), suggest that the word "designed" in Section 2511 (2) (g) (i) be replaced with the word "intended" for reasons of clarity.

5. (U) In Section 101 (b), we believe the words used to describe different types of radio systems in Section 2511 (2) (g) (ii), e.g. "walkie talkie", "citizens band", "amateur radio", and "for the use of the general public which relates to ships, aircraft, vehicles, or persons in distress," are too colloquial for enduring legislation. For instance, the description might include "radio systems, the communications of which do not enjoy a reasonable expectation of privacy," or might specifically list systems such as "hand-held radio transmitters", "marine-band radios", "aircraft-band radios", "transmitters operating in frequencies reserved for the use of the government", and so on.

6. (U) We recommend that a new section be added in Section 101 (b) to become Section 2511 (2) (i), which would read as follows: "(i) It shall not be unlawful under this chapter or the Foreign Intelligence Surveillance Act of 1978, for duly authorized components of the executive branch of the United States to intercept the electronic communications of the executive branch which are transmitted by radio when the interception is to assess the security of those electronic communications from interception and exploitation." This change would make clear that communications security monitoring of radio communications systems which would not require a warrant for interception under Section 2511 is lawful. Communications security monitoring of communications systems which are protected by Section 2511 would still be permissible but only where consent for the monitoring had first been obtained.

7. (C) We recommend adding a provision in Section 101(b) of the bill that would amend 18 U.S.C., Section 2511 (2) (f), by adding, after the words "international or foreign communications", the words "or from a foreign electronic communications system." This change makes explicit that certain United States Government intelligence activities directed at foreign data bases are not within the purview of Title III.

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✓cc: DOJ, Office of Intelligence Policy and Review

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