MEMORANDUM FOR FREDERICK BARON
Special Assistant to the Attorney General

Re: Security Issues Under Foreign Intelligence Surveillance Act

The purpose of this memorandum is to summarize the issues that need to be discussed with Admiral Turner and the Chief Justice concerning the security procedures under the Foreign Intelligence Surveillance Act (FISA). These issues were identified at a preliminary meeting with Intelligence Community personnel on October 27, 1978, and are addressed, although not in as great a detail as expected, in memoranda forwarded to Judge Bell by Tony Lapham on 11/29/78 and received here on 11/30. Admiral Turner reviewed the memoranda and concurs in their use as the basis for further discussion. We attempt here to be "honest brokers" of the Intelligence Community's position and to put their views forward in the strongest terms. This is important because the contrary views will be so apparent to Judge Bell.

1. Location of court. This is the central issue and resolution of it will determine the manner of resolution and most issues that follow. It would be hard to over emphasize the desire of the FBI, NSA, and CIA to have the court located in executive branch (the Department of Justice) premises. They realize, of course, that this may not be acceptable, but we should at least give it careful consideration. Strong support for this position is found in the legislative history of the Conference Report at p. 27.

> "The conferees also agree that the security measures to be established by the Chief Justice shall include such document, physical, personnel, or communications security measures as are necessary to protect information concerning proceedings under this Act from unauthorized disclosure. Such measures may also include the use of secure premises provided by the executive branch to hear an application and the employment of executive branch personnel to provide clerical and administrative assistance."

Arguments in favor of locating the hearing room in DOJ include: (1) secure facilities already exist here; the conference room and attendant storage facilities on the 6th floor are as good as anyone wants; (2) these facilities are probably better than anything that would be set up at the federal courthouse; this does not mean that adequate facilities could not be established but it will be hard to set up anything that exceeds the security of the DOJ room; (3) the administration of the court -- from the storage of documents to the use of personnel -- will be easier to manage; (4) it will be much less expensive to use existing premises; (5) the opportunity for compromise would always be less because there would be less movement of paper and personnel; (6) the legislative history clearly supports this position.

The principal argument in opposition is that it is simply inappropriate to place the court in executive branch facilities. It would also be an additional burden on the judges to hear applications at DOJ rather than the federal courthouse. (For out-of-town judges, this might be alleviated by setting up temporary chambers in the Department).

2. Court personnel. CIA recommends, and other community members would concur, that "all functions including that usually provided by a court clerk" should be performed by executive branch personnel. This would include court reporters and a baliff, if one is necessary. CIA also recommends that a full-time security officer be assigned to the court to oversee and supervise the administration of the security procedures.

Arguments in favor of this recommendation include: (1) the legislative history quoted above supports this recommendation; (2) it will be easier to administer and require adherence to security clearance standards and procedures; (3) the court would not have to be as concerned with security if experienced executive branch personnel can be used; (4) if the court were located at DOJ, current DOJ security personnel could be used on a part-time basis and less additional personnel would have to be hired or given security clearances, or both; (5) experience with security is very important and can be achieved under this recommendation.

Again, the primary argument against using executive branch personnel is one of appearance. We think, however, that use of personnel is not as troublesome as locating the court here. This is also an area of possible compromise should the Chief Justice want to use some (or one) person from the judicial branch.

It seems that no matter where the court is located there should be a court clerk from the judicial branch, who has been through the full security clearance and indoctrination process, and at least one security trained person from the executive branch to work for the court. It is certainly conceivable that no more people would need to be involved other than a court reporter who should be selected by mutual agreement of the two branches from those reporters that work for the congressional intelligence committees.

3. Law clerks. The CIA recommends that law clerks not be used by the judges on the court; our discussions with the FBI and NSA have established their strong support for this position.

As a general matter, we agree. There is no need for transitory law clerks to be exposed to the details of even some of the applications that will be submitted to the court. But, a judge should have the option of using a law clerk for legal research. A possible compromise might be to fully clear, with complete background examination, one law clerk per year for each judge on the court. That clerk would be permitted to do legal research on issues arising under the bill but the security procedures of the court could require that the clerk not be given details except in the form of a hypothetical situation; the clerk would not be permitted to attend hearings or review any documents that revealed the details of a particular request. Perhaps even the hypothetical or issue raised for the clerk should be first cleared by the court security officer.

4. Security clearances for Judges. There are three options: (a) rely solely on the screening process done when the judge was appointed to the federal branch; (b) a limited security clearance procedure based on the previous background investigation and objective criteria used by the executive branch in the clearance process both of which would be provided to the Chief Justice for his consideration in selecting judges; (c) the same complete

security clearance process that will be used for other Judicial branch personnel, including up dated background investigations if the existing one is over 5 years old.

CIA recommends option (b) and we generally agree with this approach. The most important thing is that the Chief Justice just be aware of what the executive branch is concerned about. We think it implicit that the Chief Justice will consider a judge's character, associations, reputation, and loyalty (the scope of the standard full field investigation). He probably would not consider, however, whether a judge has relatives behind the iron curtain or might somehow otherwise be subject to coercive influence by a foreign power; these are the objective criteria mentioned above. This option would not require new background investigations and could be handled on a pretty much informal basis by the Chief Justice. Again, the important point is that he at least consider these objective criteria in making his selections.

5. Security clearances for judicial branch court personnel (other than judges).

CIA recommends and we agree that such personnel should be subject to the highest standards applicable to executive branch personnel having access to classified and sensitive compartmented information. CIA mentions that polygraph examination and secrecy agreements should be considered. We do not agree with the former but have no problem with the secrecy agreement. If there is a virtually full-time security officer from the executive branch assigned to the court to work with a court clerk or other administrative personnel, there seems little need to do more in terms of clearance procedures than is now done for DOJ lawyers, for example, that work in this area.

6. Security and storage of court records. This includes both applications to the court and related documents as well as the AG certification filed under seal pursuant to § 102(a). If DOJ facilities are used, this is really not an issue because storage could be in the vaulted area next to the room in a filing cabinet with highly restricted access and used only for those court records.

You will recall that Judge Bell suggested the use of a trust receipt procedure in his notes to our earlier memo on this subject. This seems to us a clearly acceptable approach. The trust receipts should be stored in secure facilities, and the records held by the Executive branch pursuant to it should be stored here subject to very restricted access; perhaps a system should be designed so that Executive branch personnel could not have access unless accompanied by the court clerk or other personnel from the Judicial branch.

Conclusion

There will be many details left after the basic issues are resolved but those should not present a problem and could hopefully be resolved by staff personnel of the Executive and Judicial branches.

Judge Bell might also want to consider a name for the court. We suggest the Foreign Intelligence Surveillance Court. We should stop calling it a special court.

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