File

THE WHITE HOUSE

STEWART —

THANKS FOR SENDING THE PIECE. WELL DONE. THE TREND TOWARDS BLURRING LAW ENFORCEMENT/INTELLIGENCE ROLES SEEMS TO ME TO BE GATHERING STEAM. NEXT STEP— ROUTINE TASKING OF INTELLIGENCE RESOURCES TO GATHER TACTICAL INTELLIGENCE IN O.C. CASES. SHALL WE THROW IN THE TOWEL?

PODESTA

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From

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My latest, in case you haven't seen it already.

– Stewart

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SHOULD SPIES BE COPS?

by Stewart A. Baker

Like generals ready to fight the last war, bureaucrats excel at avoiding last year's scandal. Usually that does no harm. But every once in a while avoiding last year's scandal means sowing the seeds for next year's.

That is what is happening today in a strenuous but largely hidden struggle among the federal agencies that operate at the intersection of law enforcement and intelligence gathering. The struggle has come to a head as a result of the BNL affair. Also known as Iraqgate, the BNL affair centered on charges that the Justice Department and the CIA had covered up the Bush administration's channeling of prewar military assistance to Iraq through the Atlanta branch of Banca Nazionale del Lavoro, or BNL.

Though driven by recent headlines, the struggle has its roots in the late 1940s, when the American peacetime intelligence "community" was created to help fight the Cold War. American intelligence agencies were shaped by individuals who understood the mechanics of totalitarianism and wanted none of it here. They knew that the Gestapo and the Soviet KGB had in common a sweeping authority to conduct internal and external security and intelligence gathering. Determined not to become what they were fighting, the drafters of the 1947 National Security Act declared that the newly created CIA "shall have no police, subpena [sic], or law enforcement powers or internal security functions." The CIA's role was to deal with America's foreign enemies, not its domestic wrongdoers.

The drafters of that language were only being prudent. Combining domestic and for-

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eign intelligence functions creates the possibility that domestic law enforcement will be infected by the secrecy, deception, and ruthlessness that international espionage requires. Dividing the responsibilities among different agencies reduces that risk. It also creates a tension between agencies that is itself a safeguard against abuse. It is surely no accident that the Russian democrats who helped break up the Soviet Union also stripped the KGB of its internal security duties—adopting, in essence, an American system of divided responsibility.

The irony, of course, is that the end of the Cold War has pushed U.S. policymakers in the opposite direction. A strict separation of intelligence from law enforcement proved workable enough while the Cold War continued. Apart from counterespionage work, there was little overlap between the two. The intelligence agencies had a desperate job to do abroad, but they faced a threat that was almost exclusively foreign. Law enforcement, by contrast, had few international dimensions and almost no way to address international criminal activity.

By the 1990s, much had changed. Because the Soviet Union was no longer a threat, some of the resources devoted to extracting its secrets could be turned to other tasks, to other foreign targets. But some of those foreign targets had a domestic tinge. As topics like international narcotics trafficking, terrorism, alien smuggling, and Russian organized crime rose in priority for the intelligence community, it became harder to distinguish between targets of law enforcement and those of national security.

Intelligence agencies were not alone in expanding their traditional beat. The Justice Department had gradually extended its reach into foreign affairs. If foreign heads of state could be indicted in the United States for acts committed while in office (as Manuel Noriega and Ferdinand Marcos were in the 1980s), almost any foreign policy problem could wind up as a criminal matter.

These were the practical responses of law enforcement and intelligence officials to changing times. As the 1980s wore on, the same practical officials began to see the admonition of the 1947 act as more a technicality than a guiding principle. Surely, the pragmatists argued, the two communities should coordinate their efforts to understand common problems, should pool resources to avoid unnecessary duplication, should share what they know. What was wrong with that? As intelligence "centers" focusing on joint concerns like terrorism and narcotics trade proliferated, the Justice Department became a major consumer (or at least recipient) of intelligence reports.

All that was done like border trading between vast, self-sufficient empires—at the margin, and when it suited both communities. Neither community intended to change its fundamental way of doing business. Few foresaw any danger in nibbling a bit at the principle that intelligence and law enforcement must remain separate undertakings.

The BNL Affair

Then came the BNL affair, with its charges of a massive coverup at Justice and the CIA. Two years later, such claims seem overwrought. At least three separate investigations have turned up no support for them, and no intelligence or law enforcement official has been indicted—or apparently even disciplined—as a result of BNL. Even the Clinton administration, which had no reason to soft-pedal its probe, seems now to have quietly concluded that no wrongdoing occurred in either community.[1]

At the time, however, press coverage of the affair had a strident breathlessness that brought to mind coverage of Watergate and Iran-*contra*. When it turned out that both the CIA and the Justice Department had failed to identify all of the intelligence reports on BNL in their files, respected career professionals in both agencies found themselves attacked as co-conspirators in a coverup.

Thus did these agencies learn the hidden cost of their practical accommodations in years past. Their critics were simply carrying the concept of "coordination" to its logical conclusion. If intelligence gathering has been harnessed to the cause of catching and prosecuting criminals, the outsiders said, then intelligence agencies should live by the rules that govern criminal investigators. The critics assumed that the intelligence community was obliged to search its files for any information that might help the defendant's case. So when the CIA produced arguably exculpatory documents that the Justice Department had never shown the defendant or the judge, it looked like dereliction of duty or worse.

Later, a postmortem would show that some of the intelligence reports had been sent to Justice, where they were lost or forgotten; that others were simply overlooked when the CIA first searched its own records; and that some were informal reports that had never been formalized for fear of exposing sensitive intelligence sources and methods in a criminal investigation. Gallingly, even the agencies' defenders found themselves arguing that the agencies were not corrupt, just incompetent.

That, it turned out, was also the conclusion reached in the investigations that followed. The staff of the Senate Select Intelligence Committee wrote a detailed report criticizing the government's failure to use intelligence assets to get to the bottom of the BNL affair, calling for more and better coordination between the communities and for more and better access to intelligence files. The attorney general's independent counsel, Judge Frederick Lacey, found no criminal wrongdoing at Justice or the CIA but criticized the CIA's procedures for disseminating information as well as the lack of systematic intelligence record keeping and processing at Justice.

In the wake of the investigations, a task force dominated by career officials was formed to recommend ways to improve the relationship between Justice and the intelligence community. The career officials, perhaps predictably, proposed to do more of what they had been doing—only better this time. The career officials' report has not yet been adopted by the administration, but its thrust is clear: The law enforcement and intelligence communities will continue to converge; and there are no problems in their converging relationship that cannot be solved with more staff, more computers, and more high-level coordination. It is an eminently practical conclusion.

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[1] *See Kenneth I. Juster, "The Myth of Iraqgate," in FOREIGN POLICY 94 (Spring 1994).*

But on this issue the forces of practicality are simply wrong. Putting intelligence resources increasingly at the disposal of prosecutors poses much the same threat today as it did in 1947. Intelligence-gathering tolerates a degree of intrusiveness, harshness, and deceit that Americans do not want applied against themselves.

Today the risk to civil liberties is largely theoretical. Among the more surprising discoveries I made when I joined the National Security Agency was the depth of the agency's commitment to obeying the legal limits on gathering intelligence relating to American citizens. The intelligence scandals and institutional reforms of the 1970s remain living lessons in the secret world.

However theoretical the risks to civil liberties may be, they cannot be ignored. The intelligence community serves a constituency of several hundred officials. If top military and civilian policymakers are pleased with what the community produces, it glows with success. When President Bill Clinton cancels his intelligence briefing four or five times in a week, as he did early in his term, the entire community trembles. No other part of the government has so narrow an audience—or responds so enthusiastically to guidance from above.

One of my office's jobs at the agency was to review requests for intelligence from drug enforcement agencies. In some cases, we suspected they were trying to shortcut constitutional or statutory limits, and their requests were denied. But I have no illusions that our objections would have prevailed if a different message had been coming from the leaders of the agency and the government.

As a counterweight to the risk of shortcuts, the reforms of the 1970s brought the rule of law explicitly to intelligence activities. For security reasons, that has meant attorney general review more often than judicial review. And for 20 years, it has worked well: The Justice Department has served as an effective check on the intelligence community. The department could credibly act as a surrogate judge in that period because it did not owe the intelligence agencies anything. But should it come to depend on the intelligence agencies to help it enforce the law, the department will be less credible, and perhaps less vigilant, as a guardian of civil liberties.

The difference between the legal regimes governing law enforcement and intelligence can perhaps best be seen by looking at the way each conducts wiretaps, or electronic surveillance. Police taps are governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which imposes elaborate controls. Police must have probable cause to believe that the target is engaged in a crime, the crime must be one identified by Congress as particularly serious, the police must have no way other than a tap to collect the evidence they seek, they must persuade a judge to issue a warrant for it, and they must report to the judge every few weeks to show that it is still yielding valuable information.

Taps performed for foreign intelligence purposes were not regulated until 1978, when Congress enacted the Foreign Intelligence Surveillance Act. That act governs national security wiretaps, providing protections against surveillance of Americans and requiring the government to obtain a warrant for national security wiretaps within the United States. But the warrants can last for up to a year, and the standards for granting a warrant depend not on behavior but on status. If the target is a foreign power or agent of a foreign power, surveillance will be authorized.

The standards for intelligence taps are—and must be—looser, for obvious reasons. For one, the stakes are higher. Foreign powers like the old Soviet Union certainly pose a greater threat to this country than any conceivable criminal organization. For another, the targets are more elusive. Intelligence agencies spend years intercepting anodyne conversations, waiting for the one moment when discipline breaks down and a crucial fact slips out. For a third, relations between the United States and foreign governments are governed not by the social contract underlying American democracy, but by the rules of international relations, in which espionage is hallowed by tradition.

But what happens when the distinction between law enforcement and foreign intelligence wiretaps begins to fade? The most obvious consequence is that law enforcement officials hoping to conduct a wiretap are tempted to redefine their criminal investigations in foreign intelligence terms. That saves them much of the hassle of meeting Title III standards for the wiretap. The bigger the role assigned to law enforcement in defining the country's foreign intelligence requirements, the easier that becomes. It may all be done in good faith by pragmatic men and women. But it will gradually erode some of the protections that Title III was designed to confer.

The other threat is also real though less obvious. It is that the courts will respond to the growing convergence by forcing intelligence agencies to live by the rules that govern law enforcement. The Supreme Court was careful to separate national security from criminal investigative taps in 1967 when it first declared wiretaps to be "searches" subject to the Fourth Amendment, and both Congress and the lower courts have agreed that foreign intelligence taps are judged by a different standard under the U.S. Constitution.

But courts are quick to spot a risk of abuse. In 1972, for example, the Supreme Court struck down a Nixon administration claim that the calls of domestic dissidents could be intercepted without warrants under the rubric of national security. If the distinction between intelligence and law enforcement grows too artificial, the judiciary could cripple intelligence surveillance by demanding that it conform to the same standards as law enforcement.

In fact, the consequences would be worse than that. If the courts were to determine that just one intelligence wiretap has in fact crossed the line into law enforcement's territory (and that would be easy to do, given the vagueness of the line and the growing convergence of investigative targets), a series of statutory traps would be sprung. The target would be entitled to notice of the tap. Those who approved and carried it out would be subject to prosecution for committing a felony. The sources and methods used to conduct the tap would be at risk, if not fatally blown.

A similar problem arises in deciding how and when to share intelligence with law enforcement agencies. That field is less sexy than intelligence collection but no less crucial. From Pearl Harbor to BNL, the intelligence failures that hurt the worst have not been those of collection but rather those of dissemination.

Investigative Dissemination

Dissemination to law enforcement falls into two categories: investigative and exculpatory. Investigative dissemination in many respects resembles ordinary intelligence dissemination. If, say, the Drug Enforcement Administration (DEA) is concerned about Central Asian drugs smuggled by the Russian mob, it will want to know more about both Central Asian drugs and organized crime in Russia. In preparing analyses and transmitting intelligence on these topics, the intelligence agencies are acting in an entirely traditional fashion. Over the years, law enforcement agencies and the Justice Department have expressed interest in a wide range of such topics, with the result that a torrent of intelligence has been transmitted to that department on many issues. But, as was embarrassingly clear in the aftermath of the investigations into the BNL affair, much of the intelligence that Justice gets is desultorily skimmed and discarded—if it is read at all.

Why? General information on law enforcement topics has limited value for investigators and prosecutors. What they care about, for the most part, are individual investigations leading to individual convictions. Their narrow focus shapes their view of intelligence. Intelligence that is vital while an investigation is underway suddenly becomes irrelevant once the jury has spoken. Law enforcement respects secrecy and confidential sources—but only for a time. Intelligence that cannot ultimately be introduced as evidence at trial borders on the worthless.

So if intelligence is to be valuable to Justice Department prosecutors, it must be focused on what they care about—individual investigations. That is the inevitable direction in which closer coordination with Justice will push the intelligence agencies. Not only is that what prosecutors want, but that is what the intelligence community was criticized for not doing in BNL. Critics found it incredible that the CIA did not know what defense the accused was likely to make in the BNL prosecution and that it had not sent reports relevant to that defense to the right lawyers.

Any dissemination system that seeks to move all intelligence relevant to all Justice prosecutions into the hands of prosecutors is doomed to fail. The self-preservation instincts of government officials would make coordination resemble a game of hearts: Everyone knows that, sooner or later, the game will end—that some arguably relevant piece of intelligence will not be delivered to a federal prosecutor in, say, the Southern District of Florida. When that happens, no one wants to be holding the queen of spades. Thus, the Justice Department will be increasingly inclined to issue sweeping demands for "all relevant intelligence" in any case with an international flavor. And the intelligence community will be increasingly inclined to send masses of intelligence indiscriminately to the Justice Department and let Justice figure out where it might be relevant. By implicitly offering tighter coordination as a way to avoid future BNLs, the task force is writing a check that no dissemination system can cash.

That is a recipe for failure—and a colossal waste of resources. But the cost of success would be equally high. If intelligence agencies succeed in providing the kind of case-oriented "tactical" intelligence that law enforcement values most, the distinction between intelligence and law enforcement will erode even more, with the consequences described above: a long-term risk to civil liberties or an invitation for the courts to impose law-enforcement procedures on intelligence agencies.

Exculpatory Dissemination

The other sort of dissemination to law enforcement is exculpatory. A good example of the kind of procedures that the courts could impose is found in *Brady v. Maryland* (1963). In that case, the U.S. Supreme Court held that prosecutors may not withhold from a criminal defendant information that is material and favorable to the defense. That and related rulings have left prosecutors with a clear obligation to review their files and those of investigating agencies for information that could help the defendant.

The more closely intelligence agencies work with investigators, the more often this obligation will fall on them. The long-term consequences will be worse than the pragmatists suppose. For law enforcement agencies, *Brady* searches are a pain in the neck. But for intelligence agencies, they are a nightmare.

Law enforcement agencies have learned to live with *Brady*. When the FBI opens a case, it knows that a successful investigation will only end in one place—in court. The entire investigative record-keeping system used by the FBI is designed with that end in mind. Records likely to be relevant to a later prosecution are identified and stored so as to make later criminal discovery searches easy. And reports are prepared with the trial in mind—every agent who writes a report on a case does so in the knowledge that what he writes will be read by a defense attorney at the end of the day.

Not so for intelligence agencies. The uses of their information are more diverse, the process more fluid. Intelligence agencies gather information for policymakers. An error that creeps into intelligence reporting may go uncorrected—may even be repeated—if having that fact exactly right is irrelevant to the policy issues of the day. And intelligence does not have a predetermined goal. The information does not have to be made public. So intelligence agency files are more likely than law enforcement files to contain casual speculation or fragments of data that could be construed as exculpatory. The prospect of releasing those files is thus more likely to come as a painful surprise.

That is what happened in BNL. And given the structural barriers to thorough *Brady* searches of intelligence files, we can be certain that that particular queen of spades will turn up again and again, though perhaps not in quite so charged an atmosphere.

Nor are intelligence agencies' problems finished once they find and review all the relevant documents. The Justice Department will want its prosecutors to decide which reports are relevant to their case. The prosecutors will want to be briefed on the sources and methods that produced each report. And even if they conclude that a piece of intelligence is probably not exculpatory, they will want to discuss any piece of intelligence that could conceivably assist the defendant with the judge in the case. So the judge will have to be briefed as well. Then, if any of the information is deemed materially exculpatory, it will have to be revealed in some form to the defendant and his lawyers. Under the Classified Information Procedures Act, to avoid a risk to intelligence sources and methods, the government is allowed to propose a sanitized substitute for classified data; but the substitute must be just as good as the original for the defendant's purposes. If it is not, the government must reveal its secrets or drop the prosecution.

If the distinction between intelligence and law enforcement grows too artificial, the judiciary could cripple intelligence surveillance by demanding that it conform to the same standards as law enforcement.

It is bad security to describe highly sensitive sources and methods to a steady stream of prosecutors—many of them young lawyers who will soon be making a career out of representing criminal defendants. Even worse, when a court says classified information is relevant to the defense, intelligence agencies will find themselves locked in battle with prosecutors who would rather reveal classified information than give up their prosecution. Of course, defense counsel will have every incentive to exploit the opportunity for graymail. They will strain to find ways of including classified information in their defenses, all in the hope of forcing the government to drop the case rather than reveal its secrets.

What does this add up to? In an effort to give law enforcement more information that it does not want very badly and does not use very well, government officials may be about to stretch the rules that preserve civil liberties, flirt with harsh new judicial limits on how intelligence is gathered, impose unworkable new search and record-keeping duties on intelligence agencies, spread the knowledge of intelligence sources and methods much more widely, routinize conflict between prosecutors seeking convictions and agents keeping secrets, and encourage defense lawyers to exploit each of those problems to the hilt in the hope of forcing the government to abandon the prosecution of their clients.

Why are we doing this? The practical men and women in law enforcement and intelligence tell us we have no choice. They say that all those problems will arise to some degree no matter what we do; that we cannot go back to the days when intelligence and law enforcement were sealed off from each other; and that proper coordination and good will on all sides can minimize the damage.

Maybe so, but given the stakes perhaps we should try an alternative approach first—one that preserves, perhaps even raises, the wall between the two communities. We should begin by shedding illusions. The first and most dangerous is the illusion that intelligence agencies or the Justice Department itself should be expected to identify and disseminate every piece of intelligence that might be relevant to every investigation conducted by federal law enforcement agencies. No one knows enough about the thousands of pending investigations to route intelligence reports efficiently to every interested prosecutor and investigator. To accept responsibility for doing so is like starting every game with the queen of spades in your hand. Instead of establishing mechanisms that purport to carry out that task, we should frankly declare that it cannot be done. Indeed, it should not be done; such all-encompassing distribution would align law enforcement and intelligence to a degree that should appall any student of twentieth-century history.

Instead, we should construct a dissemination system that makes sense. That means distinguishing between top Justice Department officials, who need intelligence to help them make wise policy choices, and other law enforcement officials, who want intelligence to help them make their cases.

Top law enforcement officials—the ones that allocate resources and set strategy—need the same kind of "strategic" intelligence that other policymakers do. If Chinese gangs are planning massive alien smuggling drives, or if the Russian mob has turned Central Asian collective farms into opium factories, the attorney general and the heads of the FBI and DEA need to know. But such information can and should be fairly tightly controlled. There is not much reason for it to go below the level of deputy assistant attorney general.

Individual Justice Department attorneys, and generalists like the U.S. attorneys around the country, are unlikely to need such strategic intelligence, at least in detail. To the extent that such intelligence requires analysis, the function could be centralized in a Justice Department (or investigating agency) intelligence unit. Under such a system, Justice would not get thousands of documents of doubtful relevance. And what it did get would be controlled and analyzed in a way that would make for greater accountability.

If intelligence agencies succeed in providing the kind of case-oriented "tactical" intelligence that law enforcement values most, the distinction between intelligence and law enforcement will erode even more.

It should go without saying that such information would be gathered only if it has foreign intelligence—and not simply international law enforcement—significance. Decisions about what intelligence to gather must remain the province of the director of central intelligence and the national security apparatus. But there is no reason to insist that the Justice Department be treated differently from, say, the Defense Department in the dissemination of such "strategic" intelligence.

That is not the case for "tactical" intelligence—information about particular shipments, particular schemes, particular individuals. Here the wall of separation between intelligence and law enforcement should largely be maintained. Intelligence agencies should not be asked routinely to use their intelligence-gathering authority to help law enforcement agencies bust criminals.

What about cases where both communities have a legitimate interest in gathering information about the same person or group? Surely there are both law enforcement and intelligence reasons to seek information about the man who shot several CIA employees outside CIA headquarters and then fled the country. Must the FBI and CIA work separately to track him down? No, but the investigations should be coordinated under strict controls. Most important, intelligence agencies should know in advance that they are entering into a coordinated investigation. Then they can keep records in a way that makes it easier to search for exculpatory information—and they can use sources and methods that could, in a pinch, be made public if that is the only way to bring to justice a particularly dangerous offender.

Similarly, a conscious decision to coordinate law enforcement and intelligence activities for an investigation could be preceded by an analysis of whether law enforcement is the predominant interest. If it is, intelligence should be gathered only under law enforcement authority, subject to law enforcement limits and supervision. In such cases, intelligence agencies will know from the start that they are working for—not with—law enforcement.

A system in which tactical intelligence is shared only rarely and only after careful thought will go a long way toward preserving the spirit of the 1947 act. It will protect the current legal distinction between how information may be gathered for law enforcement and national security purposes. And, with luck, it will help address the thorny question of criminal discovery.

The cases requiring that prosecutors turn over exculpatory evidence can be read as applying broadly or narrowly. Read narrowly, the obligation applies to information in the hands of the prosecutors themselves and to the investigators who developed the case. Read broadly, the obligation covers any information in any government file. In my view, the better reading of the cases is that the government ordinarily must search only those records available to the prosecutor and those aligned with the prosecutor. On that reading, intelligence records would be subject to discovery whenever the two communities engaged in a coordinated investigation—although probably only the information gathered in that coordinated effort should be open to discovery.

If there is no coordinated investigation but the defendant believes that his other activities are likely to have been of interest to intelligence agencies, no searches should be ordered—at least in the absence of strong indications that particular intelligence records will produce exculpatory evidence. The burden and risks of searching intelligence files are simply too great. Such cases will be rare. Perhaps the best example is a defendant who claims to have been violating U.S. law because he was hired by the CIA to do so; in that event, checking the CIA's employment records might be an appropriate search, but checking every operational file in the agency would not.

Ironically, the loudest objections to restricting discovery in this way will come not from judges and defendants but from prosecutors who do not want to surrender their chance to review intelligence files. The reasons for the resistance are many. Turning over exculpatory evidence is seen as a prosecutor's ethical obligation. It is difficult to delegate that obligation to another, particularly someone who does not know the case as well as the prosecutor. And, some prosecutors say, the intelligence agencies have not proven reliable when they conduct *Brady* searches on their own. Some in the intelligence community, on the other hand, suspect that while prosecutors talk about having to search for exculpatory information, they never really abandon the hope that their search will turn up something inculpatory. Finally, prosecutors are heavily influenced by the expectations of district court judges, who tend to want broad discovery in order to forestall postconviction appeals. Prosecutors would much rather inconvenience intelligence agencies than annoy the local judges they deal with (and depend on) every day.

The only way out of that box is to elevate the issue beyond the reach of individual prosecutors' preferences and district courts' jawboning. That will only happen if the highest levels of the Justice Department decide that discovery of intelligence agency files should be resisted strongly. The department and the intelligence community need to agree on when a search is necessary and when it is not. At a minimum, that standard should be written into the prosecutors' manual; a statutory standard would be even better.

Either way, to maximize the chances of prevailing against the inevitable constitutional challenge, access limits should apply to prosecutors as well as defendants. As a practical matter, judges are more likely to order that documents be turned over if they come from files the prosecutor has already searched. And the briefing of sources and methods that accompanies prosecutorial searches is at least as great a strain on security as debating the relevance of a few arguably exculpatory documents before a federal judge.

When I was at the National Security Agency, we used to joke about the predictable stages traversed by prosecutors who sought intelligence reports in connection with big investigations. The first reaction was open-mouthed wonder at what the intelligence agencies were able to collect. That was followed by an enthusiastic assumption that vast quantities of useful data must lie in our files. Next came the grinding review of individual documents and the growing realization that the reports were prepared for other purposes and so were unlikely to contain much of relevance to the investigator's specific concerns. Last came ennui, and a gritted-teethed plod through the reports, mostly to avoid a later charge that the examination was incomplete.

The lesson of that progression is one that must be conveyed more widely. Intelligence agencies have great capabilities, but they only produce useful intelligence if they are asked the right questions. Reviewing intelligence collected for one purpose in the hopes that it will shed light on some related issue is almost always a fool's errand. Except for employment files and the like, the only intelligence files likely to contain information genuinely relevant to a criminal case are those assembled as part of a coordinated law enforcement/intelligence investigation. In short, prosecutors and defendants lose little or nothing if searches are restricted to such files.

Implementing that alternative approach will take courage and persistence. It may well seem impractical, at least in the short run. The advantages of coordination and convergence can be realized here and now: New roles are created for intelligence officials; new worlds are opened to law enforcement officials; the echoes of the BNL affair are stilled. The risks that come with more coordination and convergence—risks to sources and intelligence-gathering techniques—all lie in the future. But the advantages of convergence are so fleeting, and the risks so palpable, that we cannot afford to settle for practicality.

OFFICE OF MANAGEMENT AND BUDGET

File wiretapping

93 JUL 13 P1:17

LEGISLATIVE REFERENCE DIVISION

TO:	***AGENCY:***	***PHONE NUMBER:***
John Podesta → ok on wiretapping?		
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Number of Pages (INCLUDING THIS COVER SHEET) ___

Date: 7/12

Comments: Re: DOJ draft bill, the "Alien Smuggling Enhanced Penalties Act"

DOJ has provided the attached analysis of the wiretap section of the above-referenced bill. DPC (Strong | Cerda) advises they will sign off on this section if subsections (1)(d) and (2) are deleted. Please let me know if that is acceptable to you by COB Tuesday, 7/13. Thanks.

cc: Jim Jukes

§ 2516. Authorization for interception of wire, oral, or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, ~~or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General~~ may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

"or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in, or one other officer or employee of, the Criminal Division specially designated by the Attorney General"

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 215 (relating to bribery of bank officials), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1032 (relating to concealment of assets), section 1084 (transmission of wagering information), section 751 (relating to escape), section 1014 (relating to loans and credit applications generally; renewals and discounts), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential and Presidential staff assassination, kidnaping, and assault), section 1951 (interference with commerce by threats of violence), section 1952 (interstate and foreign travel or transportation in aid

of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), section 1344 (relating to bank fraud), sections 2251 and 2252 (sexual exploitation of children), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), and section 1341 (relating to mail fraud), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), ~~or~~ section 1992 (relating to wrecking trains);

"or a felony violation of section 1028 (relating to production of false identification documentation), section 1546 (relating to fraud and misuse of visas, permits, and other documents;"

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

§ 2518. Procedure for interception of wire, oral, or electronic communications

* * * *

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(including personnel of a foreign governme: or of a State or subdivision of a State)

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 11(c)(2) of the Natural Gas Pipeline Safety Act of 1968 (relating to destruction of a natural gas pipeline) or section 902(i) or (n) of the Federal Aviation Act of 1958 (relating to aircraft piracy);

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(*l*) the location of any fugitive from justice from an offense described in this section; or

"(m) a violation of section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) (relating to alien smuggling), of section 277 of the Immigration and Nationali Act (8 U.S.C. 1327) (relating to the smuggling of aliens convicted of aggravated felonies or of aliens subject to exclusion on grounds of national security), or of section 278 of the Immigration and Nationali Act (8 U.S.C. 1328) (relating to smuggling o aliens for the purpose of prostitution or other immoral purpose);"

(n) ~~(m)~~ any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms);

(o) ~~(n)~~ any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms); and

(p) ~~(o)~~ any conspiracy to commit any offense described in any subparagraph of this paragraph.

§ 2510. Definitions

* * * *

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

"and additionally, for purposes of section 2517(1)-(2), any person authorized to perform investigative, law enforcement, or prosecutorial functions by a foreign government."

Analysis of the Electronic Surveillance Amendments Contained in Section 105 of the Proposed Alien Smuggling Enhanced Penalties Act of 1993

Subsection (1)(a), (b) and (c)

Description of Change

These provisions amend the list of predicate offenses set forth in 18 U.S.C. 2516(1) whose presence permit the use of the electronic surveillance statute. Added to the current list are:

- felony violations of 18 U.S.C. 1028 relating to production of false identification documents;

- violations of 18 U.S.C. 1546 relating to fraud and misuse of visas, permits and other documents;

- violations of 18 U.S.C. 1542 relating to false statements on passport applications [this provision was added to a later version of the proposed bill];

- violations of 8 U.S.C. 1324 relating to alien smuggling;

- violations of 8 U.S.C. 1327 relating to the smuggling of aliens convicted of aggravated felonies or aliens subject to exclusion on grounds of national security; and

- violations of 8 U.S.C. 1328 relating to smuggling of aliens for the purposes of prostitution or other immoral purposes.

Analysis of Change

The wiretap statute in Title 18, United States Code, only permits electronic surveillance in investigations involving one or more of a specific list of predicate offenses. Although the list is extensive, and contains many of the most severe offenses, it does not include the ones listed in the amendment, which are most often found in illegal smuggling investigations. This amendment will enable investigators to utilize the electronic surveillance statute in the investigation of these specific offenses that are common to illegal alien smuggling.

Subsection (1)(d) -- Delete per DPC

Description of Change

This provision adds to the existing list in 18 U.S.C. 2516(1) of the officials who may be designated by the Attorney General to authorize the filing of an application to a federal judge for an order authorizing electronic surveillance. Those added are Acting Deputy Assistant Attorneys General in the Criminal Division and one other officer or employee of the Criminal Division.

Analysis of Change

Currently, electronic surveillance orders are authorized, pursuant to a delegation from the Attorney General, by the Assistant Attorney General and the Deputy Assistant Attorneys General in the Criminal Division. Recent experience has shown that the electronic surveillance work is creating a time burden on this limited number of officials (at present just two in the absence of a confirmed Assistant Attorney General). The Division's responsibilities have increased recently in areas of drug enforcement, antiterrorism and violent crime matters. At the same time, the number of electronic surveillance requests have also increased; adding predicate offenses in the alien smuggling area can only add to the total. The addition of other officials to approve these requests is intended to ease the burden that the electronic surveillance requests cause to this limited group of high officials. Review of such requests is extensive in the United States Attorneys Offices, the investigative agencies and the Criminal Division Office charged with initial review. Thus, a number of senior officials have reviewed such requests prior to their submissions for final approval. The Criminal Division intends to recommend to the Attorney General that she designate as the one additional officer or employee to approve electronic surveillance requests the head of the Office in the Criminal Division that now submits these requests for approval. That Office's recommendations are invariably approved and approved orders are never later suppressed by the courts for lack of probable cause.

Subsection (2) — Delete per DPC

Description of Change

This provision amends the portion of 18 U.S.C. 2518(5) that lists those personnel who can conduct the actual electronic surveillance interceptions once a court order has been obtained. Added to "Government personnel" will be personnel of a foreign Government or of a state or subdivision of a state. All such persons will be acting under the supervision of a federal investigative or law enforcement officer authorized to conduct the interception.

Analysis of Change

Wiretaps are inherently costly in terms of agent time. They must be monitored on a 24 hour, seven-day-a-week basis, in order to assure that non-pertinent conversations are minimized and not intercepted. In 1986, the phrase "Government personnel or ... individual [acting] under the supervision of an investigative or law enforcement agent" was added to the statute to alleviate the problem of constant and often multi-agent presence at the listing post. There is some ambiguity in the term "Government personnel" and it is not clear that it goes beyond federal employees to include state and local Government employees. The amendment clears up that ambiguity. Allowing foreign government employees to conduct the interceptions under the supervision of FBI or DEA agents is in recognition of the fact that drug and terrorism cases are more and more international in aspect and foreign police officers are often familiar with the case from investigations in their own countries. Allowing them to conduct the physical interceptions under supervision permits for immediate translations and for voice identifications to assist in minimization. Use of foreign officers for this purpose is not common today and can be done even under current law by means of deputizing them as United States Marshals. The amendment recognizes that their use may become more frequent in the future and eliminates the need for the cumbersome deputation process.

Subsection(3)

Description of Change

This amends the definition in 18 U.S.C. 2510(7) of "investigative or law enforcement officer" to include persons authorized to perform investigative, law enforcement, or prosecutorial functions by a foreign government but only for the limited purposes of the first two subsections of the provision of the statute (18 U.S.C. 2517) that regulates the disclosure of the contents of any electronic surveillance interception.

Analysis of Change

Once an electronic communication has been legally intercepted, 18 U.S.C. 2517 carefully and restrictively regulates who may disclose or use the contents of the interception. Release of the contents without statutory authority can be prosecuted as a felony. In general, 18 U.S.C. 2517 permits a federal law enforcement investigator or officer to disclose the contents of an intercepted conversation to another law enforcement or investigative officer to the extent that the disclosure is appropriate to the disclosing person's proper performance of his official duties. This would authorize an FBI agent who has intercepted a conversation pursuant to a court order to reveal it, for instance, to the Assistant United States Attorney who will prosecute the case. He may also use the contents in a way appropriate to the performance of his duties such as including it in a search warrant application. Adding foreign law enforcement officials to the definition of "investigative or law enforcement officer" limited to the disclosure section, will enable federal agents and prosecutors to share such contents, where appropriate, with foreign law enforcement agents and prosecutors. This is in recognition of the growing international nature of investigations in narcotics, terrorism and alien smuggling cases.

file wiretapping

July 2, 1993 93 JUL 2 P7:15

NOTE TO JOHN PODESTA

FROM: JOSE CERDA III

SUBJECT: WIRETAPPING PROVISIONS TO PROPOSED ALIEN SMUGGLING LEGISLATION

Donsia has been working with the Justice Department, NSC and others to draft legislation to address the alien smuggling problem that has caught the press' attention. Included in this draft legislation are provisions to expand the use of court-authorized wiretapping. Career staff at NSC, INS and DOJ strongly support these provisions. Donsia has asked for my opinion, and -- while I am no wiretapping expert -- it seems to me that there is more here than meets the eye.

Since your old boss, Senator Leahy, has had jurisdiction in this area, I thought you might have some insights -- not to mention interest -- in this area.

8 pages
PG 1 of 8
Latha

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

June 29, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #D-292
DRAFT #297

TO: Legislative Liaison Officer -

DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
LABOR - Robert A. Shapiro - (202)219-8201 - 330
STATE - Julie C. Norton - (202)647-2137 - 225
TRANSPORTATION - Tom Herlihy - (202)366-4687 - 226
NSC - William H. Itoh - (202)395-3723 - 249
CEA - Francine Obermiller - (202)395-5036 - 242
ONDCP - David Rivait - (202)467-9870 - 257
TREASURY - Richard S. Carro - (202)622-1146 - 228

FROM: JAMES J. JUKES (for)
Assistant Director for Legislative Reference

OMB CONTACT: GERRI RATLIFF (395-3883)
Secretary's line (for simple responses): 395-3454

SUBJECT: JUSTICE Draft Bill Alien Smuggling Enhanced Penalties Act of 1993 -- REDRAFT

DEADLINE: 2:00 ~~P.M. WEDNESDAY~~ June 30, 1993

OMB 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 advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Lin Liu
Cora Beebe
Ken Schwartz
Chris Edley
Jeff Ashford
Bob Damus
Donsia Strong
Vince Foster/Cliff Sloan
Roger Adkins

Peggy Young
Brad Kyser
Arnold Donahue
Bruce McConnell
Ed Springer
Adrien Silas
Jim Duke
Jose Cerda

LRM #D-292

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is **simple** (e.g., concur/no comment) we prefer that you respond by **faxing** us this response sheet. If the response is **simple** and you prefer to call, please **call the branch-wide line** shown below (NOT the analyst's line) to leave a message with a secretary.

You may **also respond** by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please **include** the LRM number shown above, and the **subject** shown below.

TO: GERRI RATLIFF
Office of Management and Budget
Fax Number: (202) 395-3109
Analyst/Attorney's Direct Number: (202) 395-3883
Branch-Wide Line (to reach secretary): (202) 395-3454

FROM: ______________________ (Date)

______________________ (Name)

______________________ (Agency)

______________________ (Telephone)

SUBJECT: JUSTICE Draft Bill Alien Smuggling Enhanced Penalties Act of 1993

The following is the response of our agency to your request for views on the above-captioned subject:

_______ Concur

_______ No objection

_______ No comment

_______ See proposed edits on pages ______________

_______ Other: ______________________

_______ FAX RETURN of _____ pages, attached to this response sheet

Draft

A BILL

To strengthen criminal sanctions for alien smuggling and related criminal activities and to enhance the investigatory authority of the Immigration and Naturalization Service.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

SECTION 101. SHORT TITLE.

This Act may be cited as the "Alien Smuggling Enhanced Penalties Act of 1993."

SECTION 102. ENHANCED PENALTIES FOR CERTAIN ALIEN SMUGGLING.

(a) Section 1324(a)(1) of title 8 of the United States Code (Subsection 274(a)(1) of the Immigration and Nationality Act), is amended by striking "shall be fined in accordance with Title 18, or imprisoned not more than five years, or both, for each alien in respect to whom any violation of this paragraph occurs" and inserting "shall, for each alien in respect to whom any violation of this paragraph occurs, be fined in accordance with title 18 or (i) in the case of a violation of subparagraph (A), imprisoned for not more than ten years, or both, and (ii) in the case of a violation of subparagraphs (B), (C), or (D), imprisoned for not more than five years, or both: Provided, that if during and in relation to the offense the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any alien, such person shall be fined in accordance with Title 18, or imprisoned not more than twenty years, or both, and if the death of any alien results, shall be imprisoned for any term of years up to life.".

(b) Section 1324(a)(2) of title 8 of the United States Code (Section 274(a)(2) of the Immigration and Nationality Act) is amended by striking "or imprisoned not more than five years, or both" and inserting "or, in the case of a violation of subparagraph (B)(ii), imprisoned not more than ten years, or both; and, in the case of a violation of subparagraph (B)(i) or (B)(iii), imprisoned not more than five years, or both.".

(c) Section 1324 of title 8 of the United States Code is amended by adding at the end the following new subsection:

"(d) Conspiracy

"Whoever conspires to commit any offense defined in this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.".

SECTION 103. SENTENCING GUIDELINES.

The United States Sentencing Commission shall promptly promulgate, pursuant to 28 U.S.C. 994, amendments to the sentencing guidelines to make appropriate increases in the base offense level for offenses under section 274 of the Immigration and Nationality Act to reflect the increases in maximum penalties for such offenses in section 102 of this Act.

SECTION 104. EXPANSION OF FORFEITURE PROVISIONS.

Section 274(b) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1324(b)) is amended -

(a) by amending paragraph (1) to read:

"(b) **SEIZURE AND FORFEITURE.** (1) The following property shall be subject to seizure and forfeiture: (i) any conveyance, including any vessel, vehicle, or aircraft, which has been or is being used in the commission of a violation of subsection (a); (ii) any property, real or personal, (A) which constitutes, or is derived from or traceable to the proceeds obtained directly or indirectly from the commission of a violation of subsection (a), or (B) which is used to facilitate, or is intended to be so used in the commission of, a violation of subparagraph (a)(1)(A), except that--

"(A) no property used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under this section, unless the owner or other person with lawful custody of the property was a consenting party to or privy to the violation of subsection (a) or of sections 274A(a)(1) or 274A(a)(2); and

"(B) no property shall be forfeited under the provisions of this section by reason of any act or omission established by the owner to have been committed or omitted by a person other than the owner while the property was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

"(C) no property shall be forfeited under the provisions of this section to the extent of an interest of the owner, by reason of any act or omission established by the owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner unless the act or omission was committed or omitted by an employee or agent of the owner or other person with lawful custody of the property, with the intent of furthering the business interests of, or to confer any other benefit upon, the owner or other person with lawful custody of the property."

(b) in paragraph (2) -

(1) by striking "conveyance" both places it appears and inserting "property"; and

(2) by striking "is being used in" and inserting "is being used in, is facilitating, has facilitated, is facilitating or was intended to facilitate"; and

(c) in paragraphs (4) and (5) by striking "a conveyance" and "conveyance" each place the phrase or word appears and inserting "property".

SECTION 105. WIRETAP AUTHORITY FOR ALIEN SMUGGLING INVESTIGATIONS AND RELATED AMENDMENTS.

(1) Section 2516(1) of Title 18, United States Code, is amended -

(a) in paragraph (c) by inserting after "weapons)," the following: "or a felony violation of section 1028 (relating to production of false identification documentation), section 1542 (relating to false statements in passport applications), section 1546 (relating to fraud and misuse of visas, permits, and other documents),";

(b) by striking "or" after paragraph (l) and redesignating paragraphs (m), (n) and (o) as paragraphs (n), (o) and (p), respectively;

(c) by inserting after paragraph (l) the following new paragraph:

"(m) a violation of section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) (relating to alien smuggling), of section 277 of the Immigration and Nationality Act (8 U.S.C. 1327) (relating to the smuggling of aliens convicted of aggravated felonies or of aliens subject to exclusion on grounds of national security), or of section 278 of the Immigration and Nationality Act (8 U.S.C. 1328) (relating to smuggling of aliens for the purpose of prostitution or other immoral purpose);"; and

(d) by striking "or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General" and inserting "or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in, or one other officer or

ALIEN SMUGGLING ENHANCED PENALTIES ACT OF 1993

Section-by-section analysis

These amendments to the Immigration and Nationality Act (the INA) would enhance the ability of the Immigration and Naturalization Service (the Service) to address the problem of alien smuggling by increasing the criminal penalties for alien smuggling, broadening the authority to obtain forfeiture of property used in or derived from smuggling operations, and providing the Service with greater investigatory authority in combating international criminal organizations.

Section 101 - Short title.

Section 101 gives this bill the title "Alien Smuggling Enhanced Penalties Act of 1993."

Section 102 - Enhanced penalties for certain alien smuggling.

Section 102 amends section 274 of the INA, 8 U.S.C. 1324, to provide increased penalties for alien smuggling in certain situations. Currently, section 274(a)(1) provides for punishment of up to five years' imprisonment. The first amendment raises the authorized punishment to ten years' imprisonment.

The second amendment provides for punishment of up to twenty years' imprisonment in cases in which the defendant causes serious bodily injury to or places in jeopardy the life of an alien in the course of the offense and up to life imprisonment if the death of any alien results.

The third amendment adds a new subsection to provide that a conspiracy to commit an offense under 8 U.S.C. 1324 shall carry the same penalty as that which applies to the substantive offense which was the object of the conspiracy. This is consistent with recent enactments in other areas. E.g., 18 U.S.C. 1956(g), 21 U.S.C. 846.

Section 103. Sentencing guidelines.

Section 103 directs the Sentencing Commission to make appropriate increases in the base offense level for alien smuggling offenses for which the maximum penalty was raised in section 102.

Section 104 - Expansion of forfeiture authority.

Under current law, the Service may obtain forfeiture of conveyances (vehicles, boats, aircraft) used to smuggle, transport, or harbor aliens. Section 102 would amend section 274(b) of the INA, 8 U.S.C. 1324(b), to broaden this forfeiture authority. The amendment makes subject to forfeiture all property, both real and personal, used or intended to be used to smuggle aliens.

Also subject to forfeiture would be any property, real or personal, which constitutes, is derived from, or is traceable directly or indirectly to the proceeds of the smuggling, transportation, or harboring of aliens. The amendment protects owners from forfeiture of property that is used without the owner's knowledge or consent and not for the benefit of the owner or other lawful possessor.

Section 105 - Wiretap authority for alien smuggling investigations.

Section 105 would amend section 2516(1) of Title 18, United States Code, to permit the Service, with judicial authorisation, to intercept wire, electronic, and oral communications of persons involved in alien smuggling operations. It would also make certain helpful procedural changes, including permitting court-authorized wiretaps to be conducted, under federal supervision, by state or foreign government personnel, permitting the disclosure of wiretap information to foreign law enforcement officials, and permitting additional officials in the Criminal Division of the Justice Department to approve applications to the courts for wiretap authority.

Section 106 - Racketeering Influenced and Corrupt Organizations Enforcement Authority.

Section 106 would amend the definitions provided in the RICO statute, 18 U.S.C. 1961(1), to authorize the use of the RICO statute to pursue alien smuggling organizations.

employee of, the Criminal Division specially designated by the Attorney General";

(2) Section 2518(5) of title 18, United States Code, is amended by inserting "(including personnel of a foreign government or of a State or subdivision of a State)" after "Government personnel"; and ?

(3) Section 2510(7) of title 18, United States Code, is amended by inserting before the semicolon "and additionally, for purposes of section 2517(1)-(2), any person authorized to perform investigative, law enforcement, or prosecutorial functions by a foreign government". ?

SECTION 106. RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ENFORCEMENT AUTHORITY.

Section 1961(1) of title 18, United States Code, is amended by striking "or" before "(E) any act" and adding after "Currency and Foreign Transactions Reporting Act" the following: ", or (F) any act which is indictable under title 8, United States Code, section 1324(a)(1) (dealing with prohibitions on bringing in and harboring certain aliens)".