THE WHITE HOUSE

WASHINGTON

February 13, 1986

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Testimony Regarding
Civil Division Authorization

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

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ M - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Richard Gephardt

☐ MI Mail Report **User Codes:** (A) _____ (B) _____ (C) _____

Subject: DOJ Testimony regarding Court Ordered Authorization

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUTOLL	ORIGINATOR	96/02/13			/ /
	Referral Note:				
Court 18	R	96/02/13		S	96/02/28
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/91

STATEMENT

OF

RICHARD K. WILLARD
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

ADMINISTRATIVE LAW AND GOVERNMENTAL
RELATIONS SUBCOMMITTEE

OF THE

HOUSE JUDICIARY COMMITTEE

CONCERNING

CIVIL DIVISION AUTHORIZATION

ON

FEBRUARY 20, 1986

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to be here today to discuss the work of the Civil Division and our 1987 budget request. The Civil Division's mission is vital to the effective and efficient functioning of the government and to the protection of the federal Treasury. Our litigation is largely defensive -- responding to mounting claims seeking billions of dollars from the Treasury and challenging key government programs. We also initiate litigation to enforce programs vital to the national interest and to recover millions of dollars owed to the government.

As the federal government's lawyer, the Civil Division is one of the largest law offices in the country. It is our task to represent the government and its officials in a variety of civil suits including subjects as broad and diverse as the government itself. The Division retains the most significant cases for personal handling -- those involving issues which are nationwide in scope such as asbestos, those in specialized courts such as the Claims Court and particularly those with major policy implications such as the Mariel Cuban class action suits, or potential cost, as in the WPPSS cases. U.S. Attorneys and client agencies litigate the remaining cases, frequently with the benefit of extensive advice from our attorneys.

As the members of this Subcommittee are undoubtedly aware, American society has become increasingly litigious, turning to the courts, particularly the federal courts, for the resolution of many ordinary disputes. Several variations in this national trend have caused our caseload to skyrocket, threatening our ability to maintain the courtroom success we have achieved in recent years. To keep pace with this caseload explosion, we are seeking 1987 budget increases of $5.7 million and 72 positions.

Much of the increased litigation defended by the Civil Division involves increased challenges to acts of Congress and implementing regulations by litigants attempting to extend the debate over policy into the courtroom, rather than allowing it to remain in the Legislative and Executive Branches, where it belongs. The Federal Programs Branch of the Civil Division defends against these attempts to diffuse your power and that of your constituents. Needless to say, Mr. Chairman, such suits are of the highest priority.

In addition to defending statutes and fundamental questions of constitutional law, the Federal Programs Branch is also responsible for defending legal challenges to a wide range of federal programs based upon regulations and executive actions,

including those affecting national security, regulatory policy, personnel actions and entitlements. Because such suits attack the manner in which the Executive Branch agencies formulate and implement policy, or attack the constitutionality of a statute or regulation, they often seek injunctive relief. If these suits are not successfully defended, the impact on government operations and effectiveness would be enormous.

For instance, in Nuclear Pacific v. Department of Commerce, a plaintiff challenged, on a number of constitutional and statutory grounds, the Commerce Department's denial of a license to export nuclear plant components. Our victory in this litigation protected the government's export license procedures in the crucial area of nuclear nonproliferation. While such a victory cannot be measured in monetary terms, its importance to the United States is of the highest magnitude. In another recent victory, we successfully defended regulations of the Federal Railway Administration aimed at protecting public health and safety by controlling alcohol and drug abuse by operators of the nation's railroads. Only last week, in Railway Labor Executives Assn. v. Dole, the Supreme Court vacated a stay, granted by the Ninth Circuit, permitting these much needed rules to go into effect. The importance of such victories in terms of safety and the ability to implement public policy is immeasurable, and cannot be overstated.

Another particularly important aspect of the Branch's work is defending injunctive actions seeking a modification in the standards for the award of federal entitlements. Frequently, special interest groups challenge statutory standards and agency regulations which govern payments under the various programs. In effect, plaintiffs turn to the federal courts to attempt to gain benefits denied to them by the Congress. Cases of this nature, which may turn on intricate and complex regulatory provisions, also have major policy implications and often place at risk hundreds of millions of dollars in unappropriated funds.

In addition to the vast majority of its defensive litigation work, the Federal Programs Branch also undertakes certain select enforcement cases. For instance, we recently completed a year-long trial seeking the recall of 1.1 million "X-Cars" and the assessment of over $4 million in civil penalties against General Motors.

A trend also significantly affecting the work of the Civil Division is the explosion of tort litigation. Increasingly, courts resolving litigation have shown a tendency to compensate plaintiffs at the expense of the defendant considered most able to pay -- irrespective of established fault or proof of

causation. At its root is an apparent assumption that liability costs would readily be covered by insurance. This has contributed to a liability insurance crisis that translates into astronomical premium increases and, oftentimes, an inability to obtain liability coverage at all.

Clearly, the federal government is the ultimate "deep pocket" for torts plaintiffs. Over the last 20 years, the caseload of the Civil Division's Torts Branch has nearly tripled, greatly outpacing our staff increases. Dollars at issue twenty years ago were a mere fraction of the dollars at stake today. The torts explosion has, and will continue to, dramatically affect the federal Treasury.

To address all these issues in a coordinated manner, the Attorney General recently established the Tort Policy Working Group, an interagency task force created under the auspices of the White House Domestic Policy Council. We will work closely with Congress on legislative proposals targeted to reform tort law as it applies to government and contractor liability, medical malpractice and product liability. We anticipate that legislative reform will take time and we do not expect to see "dividends" for a number of years. In the meantime, we are faced with a burgeoning in the number and size of torts claims -- exposing the Treasury to a potential loss of billions of

dollars. This growth in tort litigation has occurred across the board, including aviation accident claims, medical malpractice suits, Bivens litigation, and the entire spectrum of government activity, including law enforcement, regulatory actions, contract disputes and prisoner claims.

We are requesting an additional $3.2 million and 14 positions to handle the expected 27 percent increase in workload over the next two years. Highly technical, multi-million-dollar, medical malpractice claims against the government are skyrocketing and are expected to reach $46.7 billion by 1987. The growth in asbestos claims continues despite our success to date in the defense of these claims. Constitutional tort, or Bivens, suits continue to grow and require significantly more attorney time and support time to litigate. Increased resources must also be devoted to the initiation of claims to recover dollars for damages sustained by the government, such as in affirmative admiralty cases.

Another trend which is contributing to the surge in civil litigation is the growing volume of federal contracting. Over the last ten years, the government's purchase of private sector goods and services has grown by 188 percent -- in 1985 alone the federal government spent $340 billion on goods and services. The Civil Division plays a critical role in defending the

government's interest in disputes with contractors. A strong defense and timely resolution of disputes is crucial for efficient awarding and performance of contracted services. As these outlays increase, litigation resulting from commercial expenditures rises -- presenting our Commercial Litigation Branch with an ever growing caseload.

Increased defense spending, along with strengthened efforts to monitor defense procurement, has increased civil fraud referrals and defense procurement fraud litigation. In 1982, the Defense Procurement Fraud Unit was established jointly by the Department of Justice and the Department of Defense to focus on fraud in defense procurement contracts.

Heightened activity by the Defense Procurement Fraud Unit and the Inspector Generals of all the agencies has generated a sharp increase in civil fraud referrals. For instance, referrals from the Defense Contract Audit Agency (DCAA) alone have increased from 40 in FY83 to 170 last year. Because of the large dollar amounts at stake and case complexity, these fraud referrals require a proportionately greater allocation of attorney time.

The Commercial Branch also initiates cases asserting the government's creditor rights in loan defaults and

bankruptcies. This has also been a growth area because of structural changes in the economy which have placed in jeopardy many federally guaranteed loans. For instance, an increasing number of utility cooperatives which are major borrowers from the Rural Electric Administration (REA) have defaulted, or are in threat of defaulting, on loans. We also have instituted foreclosure actions on nearly one billion dollars of defaulted Maritime Administration loans. In addition, our Commercial Branch recently won another major victory in enforcing the government's contract rights to sell natural gas produced at the Great Plains Coal Gasification Project, thus permitting the project to continue.

Commercial attorneys handle all cases against the government in the Court of International Trade, the Claims Court and the Court of Appeals for the Federal Circuit. Many of the cases we litigate in the Court of International Trade significantly affect the nation's international trade policy. The expanded trial court jurisdiction of the Claims Court and the exclusive appellate jurisdiction of the Federal Circuit have caused a tremendous increase in the commercial caseload. Division attorneys are now responsible for Merit Systems Protection Board appeals, previously handled by U.S. Attorneys and heard in the Circuit Court of Appeals. The escalating number of appeals in agency personnel cases and contract cases continues to strain available resources.

Finally, Mr. Chairman, the Administration and the Attorney General have placed great importance on the task of collecting debts owed to the United States as a result of defaulted loans, settlements or judgments, and other court-imposed obligations. While the U.S. Attorneys handle the great bulk of the debt collection litigation, our Commercial Branch plays a leading role in handling major cases as well as in coordinating collection matters. And this commitment to debt collection has paid off handsomely -- over $1.4 billion in cash has been deposited in the U.S. Treasury since the effort began in 1981.

In sum, the routine business litigation of the federal government continues to increase apace. By 1987, we expect a 46 percent increase over our present commercial litigation caseload. We request an increase of $2.5 million and 58 additional positions to effectively deal with accelerating caseloads and the growing complexity of cases and to defend the Treasury against billions of dollars at issue.

Since 1983, the Civil Division has been responsible for enforcing civil immigration and naturalization laws, a vital mission in our effort to regain control of our borders. It is our job to conduct prompt and efficient litigation of cases

ranging from the routine challenge of a single alien's deportation to the massive undertakings involving huge classes of aliens such as the litigation involving the Mariel Cubans.

Attorneys in our Office of Consumer Litigation institute affirmative litigation to protect public health and safety and regulate unfair and deceptive trade practices in interstate commerce. We enforce programs governing food and drugs and consumer devices and products by initiating litigation to ensure that unsafe and adulterated products do not reach the public.

Finally, the Civil Division has a specialized appellate staff of attorneys who litigate cases challenging trial court and administrative decisions in favor of the United States and cases seeking to reverse decisions against the government. Our appellate staff has sustained a remarkable rate of success, winning approximately 83 percent of the appeals cases they handle -- a select class of cases involving the most sensitive and difficult legal issues. In the last arena for the defense of the government's interests, our attorneys also assist the Office of the Solicitor General in litigation before the Supreme Court.

In reviewing our litigation, I cannot stress enough the major impact which the continuing, unrelenting growth in our

caseload has had on the Division. Between 1981 and 1985, the Civil Division's overall caseload has increased by 140 percent, while our staff has increased by only 26 percent. In order to keep pace with these suits, we have had to make every conceivable effort to enhance the efficiency of our attorneys. Investing in technology has greatly improved the productivity of our workforce of attorneys, managers and support staff. Our integrated office automation system is tailored to the needs of our Division attorneys -- providing attorneys and support staff the tools they need to efficiently and effectively conduct legal research and create numerous legal documents for court filings. Of course, we have targeted staff increases for only the greatest and most imperative needs.

We have succeeded in bolstering our trial attorneys' effectiveness through our Automated Litigation Support program. This program provides an economical approach to acquiring and handling massive volumes of discovery, evidentiary and transcript documents critical to the successful outcome of complex litigation. It has played a pivotal role in major litigation such as Asbestos, WPPSS and General Motors. Keeping pace with innovative approaches to office automation and litigation support has enabled us to approach parity with the private bar.

Finally, the dedication, hard work and enormous professional pride of our attorneys and support staff have been invaluable in meeting this challenge. Over the past five years, we estimate that our attorneys contributed 525,468 hours of uncompensated overtime -- the quivalent of having an extra 60 attorneys at no cost to the Treasury.

In the final analysis, Mr. Chairman, our record of success is an excellent one. Civil Division attorneys successfully defeat more than 98 percent of the monetary claims brought against the United States. In 1985, we terminated over 9,000 cases seeking claims of $13.3 billion at a cost of only $274 million. At the same time, our attorneys obtained judgments totalling $283 million from our affirmative litigation. Viewed another way, for every dollar appropriated to the Division over the past five years, we defeated $859 in claims, while securing three times each appropriated dollar in recovery judgments. Overall, we actually collected and deposited to the Treasury one-and-a-half times our total budget.

Mr. Chairman, I would be glad to answer any questions you or members of the Subcommittee may have.

THE WHITE HOUSE

WASHINGTON

March 4, 1986

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Proposed Testimony on H.R. 3378: The Electronic Communications Privacy Act of 1985

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

28 PAGES -- TOTAL

STLOUIS

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

March 3, 1986

LEGISLATIVE REFERRAL MEMORANDUM

STLOUIS

TO:

Department of the Treasury - Carole Toth (566-8523)
Department of State - Lee Ann Berkenbile (647-4463)
Department of Transportation - John Collins (426-4694)
Central Intelligence Agency
Federal Communications Commission
Department of Commerce - Joyce Smith (377-4264)
Department of Defense - Werner Windus (697-1305)

SUBJECT: Department of Justice proposed testimony on H.R. 3378 -- the Electronic Communications Privacy Act of 1985.

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 Circular A-19.

Please provide us with your views no later than

COB -- MARCH 4, 1986

Direct your questions to Gregory Jones (395-3454), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: John Cooney
John Roberts
Karen Wilson
Frank Kalder
Rob Veeder

Hearing in 3/6/86

TESTIMONY ON H.R. 3378

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear here today to discuss H.R. 3378, the Electronic Communications Privacy Act of 1985.

The bill, H.R. 3378, as well as S. 1667, an identical bill proposed by the Senate, is intended to amend the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) 18 U.S.C. 2510 et seq. relating to electronic surveillance to cover the advances in technological developments in electronic communications, both aural and non-aural, that have occurred since the passage of the original legislation in 1968.

Since receiving the proposed legislation, Department of Justice representatives have had ongoing interaction with staff members of both this committee and the Senate Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary, to try and develop effective proposals to amend Title III to cover the new technology.

In addition, the Department, in conjunction with several law enforcement agencies, has conducted an in depth review of the existing legislation to ascertain how the new developments in technology can best be addressed in new legislation or in the amendment of existing legislation.

On November 13, 1985, I appeared before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary to express some of the Department's concerns based upon our review of the proposed legislation. Copies of that testimony have been provided to staff members of this committee and I will not at this time specifically reiterate all of the objections set forth in my testimony today other than to reiterate that several provisions of the bill do create serious problems for law enforcement.

At the time I testified before the Senate Committee, the Department had not completed its internal review of the existing legislation and proposed areas where either Title III should be amended or, in the alternative, new legislation developed to address new technologies. That review has now been completed. At this time I would like to suggest those areas in which the Department and the law enforcement community could support new legislation relating to electronic communication.

The Department shares the committee's concern that new technologies should be addressed legislatively. The question remains as to how that can best be done. In conducting the internal study the Department has devoted significant resources for extended periods to try and develop recommendations that the Department could support. There has been ongoing consultation with representatives of the various federal law enforcement

agencies charged with investigating federal criminal violations for which Title III may presently be invoked. In addition, there has been the ongoing dialogue between Department representatives and the staff members of this committee and the Senate committee.

In reviewing the proposed legislation as we originally received it, there was concern that a complete overhaul of the structure of Title III would impair the overall effectiveness of the existing statute. The parameters within which federal enforcement agencies and the Department were intended by Congress to function under Title III have been clearly defined through 18 years of case precedent. The statute works well and it is the Department's position that it should as much as possible be left address new technologies. That review has now been completed. At this time I would like to suggest those areas in which the Department and the law enforcement community could support new legislation relating to electronic communication.

The Department shares the committee's concern that new

02/28/86 17:36 ? NO.004 004

- 3 -

agencies charged with investigating federal criminal violations for which Title III may presently be invoked. In addition, there has been the ongoing dialogue between Department representatives and the staff members of this committee and the Senate committee.

within the meaning of the Fourth Amendment) to strict substantive and procedural requirements could only have an adverse effect on law enforcement initiatives due to the substantial resources that necessarily would be required to use them. At the same time, it's the Department's view that escalating the level of judicial supervision in these areas would not enhance the privacy interests of our citizens over the levels they now enjoy based upon existing Departmental regulations in these areas. I am referring primarily to the (1) securance of telephone toll and other business records' (2) the use of pen registers (3) the interception of paging devices; and (4) the use of location detection devices (Beepers). It is the considered opinion of the Department that present controls in these areas provide adequate safeguards against abuse. Our legislative recommendations do address "tone and voice" pagers where there are Title III implications.

Since the passage of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) 18 U.S.C. 2510 et seq., technology has been developed in the areas of both aural and non-aural transmissions of communications that was not addressed by existing legislation.

The Department of Justice recognizes that some of these forms of technology should be brought under legislative control with respect to interception of such communications by both law

enforcement agencies and private individuals. For instance, there is technology that is so similar to traditional telephone conversation that it belongs within the framework of Title III; to that extent Title III should be amended accordingly. With respect to the other types of technological development, such as electronic mail and computer transmissions using wire facilities, it is the Department's position that a new statute should be developed to address this enhanced technology.

In my testimony today, I would like to address first, those technological developments that should be incorporated into Title III; and second, those technological developments for which new legislation should be drawn. I will also discuss recommendations prepared by the Department, based upon its review, for amending the general provisions of Title III to enable law enforcement authorities to better effectuate its mandates.

I. TECHNOLOGICAL DEVELOPMENTS THAT SHOULD BE INCORPORATED INTO THE EXISTING TITLE III LEGISLATION.

The three primary areas of concern are (a) cordless or handheld telephones, (b) cellular telephone technology, and (c) tone and voice pagers.

A) Cordless or handheld telephones. In this type of communication, part of the transmission is by wire and part is by

radio. The radio part of the transmission can readily be picked up by anyone listening to commercially available radio equipment such as an AM radio receiver or a scanner. Under existing law a private citizen intercepting such a communication could conceivably incur criminal liability. There is serious question as to whether there should be a reasonable and justifiable expectation of privacy with respect to this type of transmission.

The leading and virtually only federal decision in this area is United States v. Hall 488 F2d 193 (9th Cir. 1973) in which a telephone on a boat was used to communicate to a traditional telephone on land. This conversation, partly using wire facilities and partly using radio transmission, was held to be within the proscriptions of Title III because the present statute refers to transmissions "in whole or in part by wire." Title III under this premise would apply here irregardless of the expectation of privacy because it was "in part" a wire communication. At least three state appellate courts have held that this produces an absurd result. The absurdity lies in the fact that statements overheard by an ordinary radio receiver become illegal interceptions and are deemed inadmissable in court. Although we feel bound to follow Hall because it is the only federal decision on the matter, we are inclined to agree that the result is inappropriate. See Dorsey v. State 402 So 2d 1178 (FLA. 1981); State v. Howard 679 P.2d 197(KAN. 1984); State v. DeLaurier 488 A2d 688 (R.I. 1985)

A reasonable approach to this situation would be to make Title III applicable to situations in which the wire portion of a cordless telephone conversation is to be intercepted, or to situations in which there is to be an interception of the radio portion of the transmission only where the radio portion has been encrypted and is therefore not readily accessible to citizens using ordinary radio equipment. There should be no expectation of privacy where the radio portion of the transmission can be intercepted in analog (regular voice) form. The interception of such a conversation should not impose either criminal or civil liability on either a citizen or law enforcement official. Indeed, most cordless phones carry a written warning that interception of conversations by third parties is possible. A law enforcement officer should not be subject to any greater liability than a citizen under these circumstances. In the event the conversation in encrypted, affirmative steps would have to be taken to intercept it and under these circumstances an expectation of privacy can be deemed to be reasonable.

B) Cellular Telephone Technology Cellular telephone transmissions also involve communications that are transmitted in part by the use of wire facilities and in part by the use of radio transmissions. Such technology is most commonly used in car telephones and in portable phones contained in briefcases. Like cordless telephones, a citizen with a scanning device can

readily intercept all or portions of the communication depending on conditions at the time. These calls are not as readily interceptible as cordless telephone conversations because of the likely mobility of at least one of the participants during the transmission. By their mature cordless phones must remain in relatively close proximity to one base unit. The radio transmissions in cellular technology are assigned to geographical "cells" and the frequencies on which the transmissions are conducted change at random as the sender or receiver passes geographically from cell to cell. The interceptor would have to follow the vehicle to intercept the call as it passes from cell to cell and would have to scan within each cell to find the appropriate randomly assigned frequency in each cell. However, since the cellular conversation can be readily intercepted if these procedures are followed, the cellular transmission conceivably should be entitled to no more reasonable expectation of privacy than the cordless transmission unless it has been encrypted in some way. However, we recognize the fact that a significant number of people have and use cellular telephones and at least subjectively have an expectation of privacy in its use in much the same way as they do with a conventional telephone. A similar subjective expectation of privacy does not exist with hand held telephones which, as noted, often carry specific warnings from the manufacturer. For that reason, even though we would prefer that the radio portion of these transmissions be encrypted to fully support the reasonable expectation of privacy,

we are prepared to accept legislation that with respect to cellular technology would require Title III authorization for law enforcement officers to intercept either the wire or radio transmission portion of cellular communications. We also recognize that technology in the cellular telephone area is developing very rapidly and it will only be a matter of time until the communications common carriers develop equipment that will either encrypt the calls or secure the transmissions in some other manner. Encrypted cellular calls should, of course, have full Title III protection. The industry could assist in affording fully warranted expectations of privacy by encrypting these telephones or by developing methods to transmit the messages in a digitized manner that would make it far harder to intercept.

We do think, however, that citizens scanning for recreation purposes should not incur criminal or civil liability. To forstall that result, we feel that the bill should contain a provision that a citizen will only incur criminal or civil liability where the citizen both intercepts and divulges the communication under circumstances in which the interception and divulgence are illegal, tortious or for commercial gain. We feel that his scenario provides a proper balance between the needs of law enforcement and the rights of ordinary citizens.

However, to address the problem of citizen interception, we think that consideration should be given to outlawing devices

that are used to intercept cellular telephone conversations, at least where they are primarily designed for that purpose.

Another problem that must be addressed when considering amendments to Title III is providing coverage under the statute for the growing number of private telephone companies that may not be involved in interstate commerce or use facilities in Interstate Commerce. It ought to be made clear that these are types of telephone companys are covered under the provisions of Title III.

C) Tone and Voice Pagers This type of paging device transmits an aural message to the paging device in the possession of the subscriber by means of a transmission that is in part by use of wire facilities and partially by the use of radio transmission, which, based upon existing technology is readily susceptible to interception by a individual with a compatible device on the same frequency. Much like the cordless telephone, placing it under Title III simply because some portion of the communication uses a wire arguably produces an absurd result since it can so readily be intercepted during the radio portion of the communication. The more realistic approach is to make Title III applicable to interception of the wire portions of the transmissions and to the radio portion only where the radio portion is encrypted. This again would require affirmative steps to accomplish the interception and an expectation of privacy can be deemed to be reasonable under these circumstances.

II Technological Developments for Which New Legislation Should Be Drawn

The principle other types of new technology that I will address relate to the non-aural transmission of communications through the use of wire facilities. The technology includes electronic mail and other types of transmissions accomplished by the use of computers connected to the facilities of communications common carriers or in some cases private transmission facilities. The term "communications common carrier" is a term utilized in H.R. 3378. It will have to be defined to include the companies now providing what is known as "electronic mail" and computer data providers and revisers.

Any proposed legislation should recognize the different characters of this type of transmission at its various stages. Depending upon the level of intrusion involved, different mandates should be developed for the interception of this type of communication. The communication can be divided into four stages: first, interception of prospective transmissions of the substance of a communication; second, interception or seizure of substantive data temporarily stored in a data bank of the communications common carrier prior the final transmission of the data to the recipient's electronic mailbox and its actual receipt; third, seizure of substantive data temporarily or permanently stored in the files of the communications common

carrier as a record of the transmission after it's receipt; and, fourth, transactional data other than substantive information maintained in the records of the communications common carrier indicating the date and time of the communication and its sender and recipient.

a) Authority to Intercept Prospective Communications This is authority to intercept electronic mail or other type of computer transmissions that will be sent in the future; it in analogous to Title III interceptions in which the court order directs the interception of telephone calls to be made in the next 30 days. The level of intrusion here is more than situations in which the data is merely stored, yet is still somewhat different than the case of ordinary telephone calls in which the communication is immediate and unchangeable. We believe the interception of electronic mail should include some but not all of the procedural requirements of Title III. The authorization to intercept the communication should be accomplished by a statute mandating a judicial authorization based upon probable cause akin to that which can now be secured with a Fourth Amendment search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure. This is based on the premise that the interception of electronic mail generally should be accorded no more protection than that accorded to regular mail. At the present time regular mail can be seized with a Rule 41 search warrant. Electronic mail due to its use of telephone lines should, in our view, enjoy some of the additional

protections of Title III.

The search warrant or other judicial authorization should be based upon a sworn affidavit establishing probable cause to believe that a crime has been, is being, or is about to be committed. The affidavit and judicial authorization should sufficiently specify the people involved, the facility in question, the specific offenses involved and the type of information sought to be intercepted. The order should contain a requirement for the minimization of communications not otherwise subject to interception. The order should be effective until the objective of the investigation is achieved or for a period of 30 days, whichever is less. The legislation should contain provisions for recording the intercepted communications and adequate sealing requirements to protect the integrity of the tapes. In addition, the bill should provide for criminal and civil penalities for citizens who intentionally violate the statute.

The admissibility of any evidence with respect to the interceptions would be determined by existing case law. The bill should also contain a provision allowing the judge to direct a communications common carrier to cooperate and assist law enforcement personnel in the execution of a court order in any way that is appropriate. The provision should further provide the carrier with immunity from civil liability for cooperating and reasonable reimbursement for services rendered.

The bill should also have a provision that covers computer to computer transmissions using telephone lines that do not have a third party communications company involved in the transaction or computer to computer transmissions on private communications from facilities not involved in interstate commerce. In addition, the new bill should contain emergency provisions similar to Title III where specifically identified supervisory personnel could authorize interception for a limited period of time until application can be made to the court in specified circumstances.

Unlike Title III, however, the bill should not require that the Attorney General, Deputy Attorney General, Associate Attorney General or a designated Assistant Attorney General be the only ones who can authorize the use the statute. Some type of provision for supervisory approval in the field should be authorized to negate the necessity of coming to Washington to secure approval. In a state, the Attorney General or the principal prosecutor in a political subdivision should be able to make the application.

An order, under the bill, should be obtainable for any offense for which a search warrant could ordinarily be issued. This legislation should also not require that there be a showing that all other investigative procedures have failed or are unlikely to succeed or are too dangerous before an order can be obtained. Additionally, the search warrant or other judicial

authorization should be issuable by a magistrate as well as a district court judge or a judge of the court of appeals. A state judge or competent jurisdiction empowered to issue search warrants should also be able to issue a search warrant or other judicial authorization under this legislation. Furthermore, annual reports on the usage of the statute should not be required.

These latter procedures that I have discussed, and that we do not recommend be included in the bill for this type of interception, are appropriate to Title III usage where the level of intrusion on aural communications is greater than the level of intrusion on electronic mail or computer transmissions. The legislation will encompass many of the principal protections of Title III without diminishing the privacy rights of individuals and will be much less burdensome on law enforcement authorities in the conduct of these types of criminal investigations.

b) <u>Interception or Seizure of Substantive Data Temporarily Stored in a Data Bank of the Communications Common Carrier Prior to Final Transmission to and Receipt by the Recipient</u>

This covers the time in which a specific communication has been sent, is in the electronic mail firm's computers but has not been delivered, or has been delivered to the electronic mailbox but has not been received by the recipient. In such a situation the communication is most like a first class piece of mail and should generally be treated in the same manner. To intercept or seize information of this nature, law enforcement personnel

should be required to obtain a search warrant or other judicial authorization predicated upon a sworn affidavit establishing probable cause to believe that a crime has been, is being or is about to be committed; this is the showing required under Rule 41 of the Federal Rules of Criminal Procedure which should apply here as it does in first class mail. All of the Fourth Amendment requirements for obtaining a search warrant would have to be observed in support of the application. Here too, a magistrate (who is now empowered to issue search warrants) should be able to issue the order as well as a District Judge or a Judge of the Court of Appeals. A state judge of competent jurisdiction who is empowered under state law to issue warrants should be empowered to issue these warrants as well. The warrant should be issuable for any offense under federal or state law for which a search warrant may now be issued. As with Rule 41, this type of warrant should provide for execution within 10 days of the time the order is signed. Since the level of intrusion here is less than in the interception of prospective communications, none of the other Title III type restrictions accorded to the order to intercept prospective transmissions would be applicable to this type of warrant or order. Lastly, a prosecutor in the field supervising an investigation should be empowered to request such an order from the court, again, this is the same system utilized in seeking a warrant to seize first class mail.

c) Seizure of Substantive Data Temporarily or Permanently Stored in the Files of a Communications Common Carrier

Substantive data that has become part of the records in the files of a communications common carrier should be available to federal investigators during the course of a criminal investigation as a third party document by the service of a grand jury subpoena. Fourth Amendment warrant requirements are inapplicable to this type of document since there is no reasonable expectation of privacy. This is a well accepted principle of law relating to documents that have been given over to third persons and we know of no legal reason why it should not apply to these types of documents.

d) Seizure of Transactional Data, Other than Substantive Information of the Communication Maintained in the Records of the Communications Common Carrier This type of record includes data retained by the communications common carrier primarily for administrative reasons, i.e., identification of the sender/receiver, date/time of transmission, subscriber, billing information, etc. This is material that is analogous to telephone toll records. We feel that the seizure of this type of information is not a "search" within the meaning of the Fourth Amendment and, therefore, should not require obtaining a search warrant. Law enforcement personnel should be able to secure this information by the service of either a grand jury subpoena or in the alternative an administrative subpoena served by a law

enforcement agency, where appropriate. We feel that there is no reasonable expectation of privacy with respect to this type of information.

e) Other Provisions As in Title III, any new legislation regulating the interception of non-aural communications at any stage should contain consent provisions so that either private citizens or law enforcement personnel would be exempt from the statute if they had the prior consent of one of the parties to the communication to make the interception. It is a well settled principle of law that no liability, criminal or civil would attach under these circumstances.

Video Surveillance

Video surveillance is an additional area in which there is at present no specific statutory authority regulating its use. We believe that separate legislative provisions should be drafted with statutory guidelines for the issuance of an court order governing the interception of visual images in those situations in which there is a reasonable expectation of privacy on the part of the subjects of the interception.

There are two basic types of video surveillance. One involves the interception of visual images in a fixed location under conditions where the person being viewed would have a reasonable expectation of privacy, i.e., a home or office. The

second type involves the interception of visual images (pictures) being transmitted from one location to another, i.e., closed circuit television.

The leading case authority in this area is United States v. Torres, 751 F2d (7th Cir. 1984). The Torres case sets forth guidelines for the issuance of a video surveillance order that in the view of the Department adequately protects the rights of citizens and is consistent with the needs of law enforcement in investigating federal violations of law. The Torres court, we note, openly invited Congress to legislate in this area.

Although there is no specific statutory authority for video surveillance, Torres held that a court could issue such a warrant to the extent that certain Fourth Amendment protections, some of which were placed in Title III, were addressed. The court required that there be a search warrant, based upon a sworn affidavit, establishing probable cause to believe a crime has been committed, is being committed or is about to be committed and establishing that normal investigative procedures have failed or reasonably appear unlikely to succeed if tried or to be too dangerous. In addition, the warrant must contain a particular description of the facilities involved, a description of the type of images sought to be intercepted, and a statement of the particular offenses to which they relate. Torres also applied the principle that the order must not allow the period of interception to be longer than is necessary to achieve the

objective of the authorization, nor in any event longer than 30 days. The court also mandated that a provision for minimizing the interception of images that were not otherwise subject to interception be incorporated in the order. As previously indicated, we feel that these criteria strike a fair balance between the privacy of our citizens and the needs of law enforcement. Current practice in the Department of Justice is to apply the above principles and the teachings of Torres to all requests for closed circuit television involving the invasion of a reasonable expectation of privacy.

For the same reasons as discussed in connection with Title III and the new legislation directed to non-aural communications, legislative authorization of this type should include consent provisions where the interception is made with the prior consent of one of the parties. The consent provision should be applicable to both citizens and law enforcement officers.

In a great majority of cases in which video surveillance is used, it is used in conjunction with an order to intercept aural communications under Title III. In those cases the subject of the interception would enjoy the dual protection of Title III and the new legislation. Interception of the visual images alone still would enjoy a significant portion of the protection accorded to Title III interceptions.

Finally, due to the degree of potential invasion of privacy involved, the authority to authorize requests to the court for video surveillance orders should be centralized in Washington, D.C. Under current procedures the Attorney General has authorized the Assistant Attorney General, a Deputy Assistant Attorney General, the Director or Associate Director of the Office of Enforcement Operations can grant the authority to make a closed circuit television request. In practice, this has worked out extremely well and we see no reason to escalate the level of supervision. We recommend that the Attorney General by statute be granted the power to delegate this authority by appropriate regulation.

III. Expanded Coverage of Title III

I would like now to turn to several specific proposals to make the current Title III statute even more useful than the last 18 years have proven it to be. The original drafters of Title III sought to minimize its use by specifically limiting its application to designated crimes. There was concern that if its coverage was expanded that there may be abuses. The enumerated crimes were those that Congress perceived as being the most significant at the time. The time has come to re-evaluate that thinking. Eighteen years of experience with the statute have demonstrated that abuses have been almost non-existent. Title III is so well understood today that there is no more reason to

limit its application. In today's society there are a host of other significant crimes where the use of Title III would greatly facilitate the investigations. In fact, from time to time Congress has added new felonies as Title III predicate offenses in almost a haphazard fashion somewhat akin to recognizing the newest most fashionable offense of that year. For these reasons we recommend that Title III should be expanded to cover all felonies. I'd like to relate some of the serious crimes that we encounter today which are not specifically covered by Title III although some of them are covered generically by the statute: Threatening or retaliating against a federal official (18 U.S.C. 115); Destruction of an energy facility (18 U.S.C. 1365); Destruction of an aircraft or aircraft facility (18 U.S.C. 32); Aircraft Hijacking (Fugitive Apprehension) (49 U.S.C. 1472); Hostage Taking (18 U.S.C. 1203); Murder For Hire (18 U.S.C. 1952 (A)); Violent Crimes in Aid of Racketeering (18 U.S.C. 1952(B)); Solicitation to Commit a Crime of Violence (18 U.S.C. 373); Mail Fraud (18 U.S.C. 1341); Illegal Wiretapping (18 U.S.C. 2512); Transportation of Stolen Vehicles (18 U.S.C. 2312); Sale or Receipt of a Stolen Vehicle (18 U.S.C. 2313); Trafficking in Motor Vehicle Parts (18 U.S.C. 2320); Computer Fraud (18 U.S.C. 1030); Fraud involving credit access devices (18 U.S.C. 1029); and Bail Jumping (18 U.S.C. 3150). In addition provision should be made to use Title III to track down and apprehend federal fugitives.

At the very least, the impact of these crimes on society justifies their specific inclusion in Title III. However, all felonies have an adverse impact and the availability of Title III can make the difference in any felony investigation. Law enforcement officials should have the most modern technology available at their disposal if they are to meet today's challenges in investigating crime and prosecuting criminals.

A provision should be included in Title III to allow the Acting Assistant Attorney General in charge of the Criminal Division to authorize a request for a Title III interception and/or eavesdropping warrant. This person is responsible for the operations of the Criminal Division when the Assistant Attorney General is not available, and there is no legitimate reason why this official should not be able to exercise this authority. This authority could greatly reduce delays caused by the absence of the Assistant Attorney General and the need to send Title III applications to substitute Assistant Attorney Generals not fully familiar with federal criminal law.

A provision should be included in Title III allowing for the interdistrict use of a mobile eavesdropping device or "bug", i.e., where the order is signed in one district to install a bug in a vehicle and the vehicle temporarily goes to another district during the interception period. An order should not be

necessary, as is current practice in each district into which the vehicle travels. The judge in the originating district should be authorized to issue an order that would be effective in all districts into which the vehicle travels during the interception period. This procedure would greatly reduce the burden on law enforcement officials and we believe it is a practical approach to this problem, without diminishing any Fourth Amendment protection.

A provision should be included in Title III that would allow for an interception order to be issued targeting an "individual" at whatever facility within the jurisdiction of the court that he or she is using at a given time, as opposed to the authority to intercept only at a particular facility. This is in line with the reasoning of Katz v United States, 389 U.S. 347, that people are protected by the Constitution and not places. Such an amendment could have significant implications in the investigation of major drug violators, organized crime figures and terrorists. Furthermore, in cases involving iminent danger to individuals, such as kidnapping or hostage taking, there could be dramatic results from such an amendment.

Another provision that should be included in Title III would authorize the use of support personnel under the close supervision of an investigative and law enforcement officer to assist in the conduct of a Title III. A great deal of the work now being done by law enforcement officers could be taken over by

these people leaving the law enforcement officers more time to concentrate on the investigation.

A provision should be included in Title III to provide for "after the fact minimization" of foreign language communications where the particular foreign language experts are not readily available during the interception period. This provision should give the issuing judge the power, if the judge so determines that the facts of the particular case warrant it, to authorize this procedure.

A provision should be included in Title III providing for a good faith exception to the exclusionary rule in Title III cases as enunciated in United States v Leon, 104 S. Ct. 3430 (1984). A federal violator should not be allowed to escape justice simply because of unintended substantive or procedural mistakes of a law enforcement officer. The judge in each case should have the authority to decide whether or not the exclusionary rule should apply in these situations.

A provision should be included in Title III to allow for the thirty (30) day period to run from the time the interception begins as opposed to the time when the order is signed. Reasonably, the authorities should have at least ten (10) days (as is the case with execution of a search warrant under Rule 41) within which to institute the interception. This would address common difficulties that arise in the installation process while

still allowing for the full maximum interception period allowed by the court.

With respect to the new legislation relating to non-aural communications, the legislation should contain specific authority for the states to enact similar legislation allowing for the state Attorney General or the principal prosecuting attorney in a political subdivision thereof to make application to the court for interception authority. We also recommend that there be a two year delay for the effective date of the new legislation as it applies to the states to allow the states to pass enabling legislation following the guidelines of the federal legislation.

In conclusion, I would like to reiterate that a great deal of thought has been given to the development of these recommendations. We feel that these amendments to Title III and the new legislation for non-aural communications comprise reasonable standards that the Department of Justice and the federal law enforcement agencies could support. Naturally, the details of each proposal require further specification. However, the principles are viable and should provide legislative guidance in these areas for years to come barring unforseen developments. The Department is committed to working with your staff and with the Senate staff to produce effective legislation.

That concludes my formal remarks, Mr. Chairman. I would be happy to discuss the individual proposals with you.