



U.S. Department of Justice


Office of Intelligence Policy and Review

~~SECRET~~

~~HANDLE VIA COMINT  
CONTROL SYSTEM ONLY~~

Washington, D.C. 20530  
December 18, 1984

TO: Ronald L. Blunt  
Special Assistant to the  
Attorney General

FROM:  Mary C. Lawton  
Counsel for Intelligence Policy

Ron -

Attached for the Attorney General's approval are proposed procedures governing monitoring by NSA of the radio communications of suspected international narcotics traffickers in or over U.S. territorial waters or foreign and international waters. NSA currently monitors such communications and these procedures are designed to ensure the program is clearly authorized and conducted in a reasonable manner. Therefore, expedited consideration of the procedures would be very helpful to the field personnel who actually conduct the monitoring.

~~Classified by Derivative Letter to Atty. General dtd. 11/30/84 from Dir., NSA.~~  
~~Declassify On: OADR~~

~~SECRET~~

~~HANDLE VIA COMINT  
CONTROL SYSTEM ONLY~~



U.S. Department of Justice

Office of Intelligence Policy and Review

~~TOP SECRET~~

~~HANDLE VIA COMINT  
CONTROL SYSTEM ONLY~~

Washington, D.C. 20530

December 18, 1984

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: NSA Procedures for Monitoring Radio  
Communications of Suspected Inter-  
national Narcotics Traffickers

Attached for your approval are proposed Procedures for Monitoring Radio Communications of Suspected Narcotics Traffickers promulgated by the Director of the National Security Agency (NSA) under Executive Order 12333. (Tab A). These procedures are consistent with all applicable law and I recommend that you approve them and sign the attached proposed transmittal letter to General Faurer. (Tab B). ~~(MS/INCCO)~~

BACKGROUND

Last year the NSA requested our opinion as to whether the U.S. Signals Intelligence System (USSS) possessed the authority to intercept and disseminate the radio communications of suspected international narcotics traffickers operating in the Caribbean and other areas in closer proximity to the United States. We concluded in a legal memorandum (Tab C) that the USSS possesses such authority for foreign intelligence purposes and that well-settled legal principles also permit incidental use of the acquired information for law enforcement purposes by law enforcement agencies with the requisite jurisdiction. ~~(IS/INCCO)~~

We also concluded, however, that, as the vessels of international narcotics traffickers approach and enter U.S. territorial waters or airspace, the foreign intelligence interest diminishes to the point where the activity must be premised upon and consistent with the legal authorities that govern provision of law enforcement assistance by intelligence agencies or the military. We recommended that a new procedure should be promulgated by the NSA Director and approved by the Attorney General to ensure that this activity is clearly authorized and conducted in a reasonable manner. The reasons for our recommendation were: (1) current NSA-Attorney General procedures governing signals intelligence activities deal only with

~~Classified by Derivative Multiple Sources.  
Declassify On: OADR~~

~~TOP SECRET~~

~~HANDLE VIA COMINT  
CONTROL SYSTEM ONLY~~

81PR5353

~~TOP SECRET~~

~~HANDLE VIA COMINT  
CONTROL SYSTEM ONLY~~

EO 3.3b(3)  
PL 86-36/50 USC 3605

- 2 -

nonpublic communications, whereas the communications involved in this activity are essentially public, and (2) those procedures reflect a policy that the USSS should not intercept U.S. person communications deliberately whereas such persons may be involved at all levels of the activity to be monitored in this program. The attached procedures are intended to satisfy this recommendation. ~~(TS//NFCSO)~~

#### ANALYSIS

The radio communications that the USSS would intercept and disseminate involve both foreign intelligence and law enforcement interests. While aircraft and sea vessels are on, in, or over foreign or international waters, the foreign intelligence interest in the surveillance is apparent. In these circumstances, such interceptions are regulated by the legal authorities governing foreign intelligence activities. As you may recall, the President accepted your recommendation in  to make clear that Executive Order 12333 authorizes the USSS to intercept and disseminate information regarding international narcotics production and trafficking as part of its foreign intelligence mission pursuant to tasking by the CIA. Once such communications have been intercepted for foreign intelligence purposes, the incidental dissemination and use of their contents for law enforcement purposes is legally permissible. ~~(TS//NFCSO)~~

As such aircraft and vessels leave foreign or international waters and enter U.S. territorial waters or airspace, however, the assertion of a foreign intelligence interest appears less reasonable and the law enforcement interest can no longer be fairly characterized as incidental. At this point, the activity assumes the nature of assistance to law enforcement authorities, which is authorized by section 2.6(b) of Executive Order 12333 unless otherwise precluded by law. Because the radio communications in question do not involve a reasonable expectation of privacy for Fourth Amendment purposes, there is no constitutional bar to acquisition and dissemination of such communications by the USSS. ~~(TS//NFCSO)~~

As for statutory considerations the Posse Comitatus Act (18 U.S.C. 1385) limits the activity insofar as NSA relies upon military elements in the intercept program. In order to facilitate use of the armed services to combat narcotics trafficking, the 1982 Department of Defense Authorization Act included provisions that are intended to codify and clarify Posse Comitatus interpretations that had been developed by the courts. These provisions (10 U.S.C. 371-78) authorize the Secretary of Defense to provide equipment to law enforcement officials for law

~~TOP SECRET~~

~~HANDLE VIA COMINT  
CONTROL SYSTEM ONLY~~

~~TOP SECRET~~

HANDLE VIA COMINT  
CONTROL SYSTEM ONLY

EO 3.3b(3)  
PL 86-36/50 USC 3605

- 3 -

enforcement purposes and to assign DOD personnel to operate and maintain such equipment upon request of the head of an agency with appropriate jurisdiction. Except in emergency circumstances, however, this equipment may be operated by military personnel only to the extent it is used for monitoring and communicating

[REDACTED] Finally, because the proposed activity does not constitute a "search and seizure" of the communications at issue and because the activity contemplates neither interdiction of vessels or aircraft nor any other activity involving confrontation between armed forces personnel and suspected traffickers, other limitations found in the 1982 DOD Authorization Act are not relevant here. ~~(TS//NFCCO)~~

#### PROPOSED PROCEDURES

The attached procedures embody these conclusions and provide appropriate standards for acquisition and use of relevant communications. These standards differ depending upon whether both parties are outside the boundaries of the U.S. (the 12-mile limit), one party is inside and one or more outside, or both parties are inside U.S. territorial waters.

[REDACTED]  
~~(TS//NFCCO)~~

Further, the procedures require that communications in which all communicants are U.S. persons must be disposed of upon recognition unless they concern the movement of illicit narcotics shipments. In all cases, however, technical data concerning frequency and channel usage that does not reveal the contents of such communications may be retained and disseminated to appropriate federal law enforcement agencies. ~~(TS//NFCCO)~~

Since these procedures are consistent with relevant legal authorities and controls and will serve to facilitate this form of assistance to the government's anti-narcotics programs, I recommend your approval. (U)



MARY C. LAWTON  
Counsel for Intelligence Policy  
Office of Intelligence Policy and Review

~~TOP SECRET~~

HANDLE VIA COMINT  
CONTROL SYSTEM ONLY



~~TOP SECRET~~



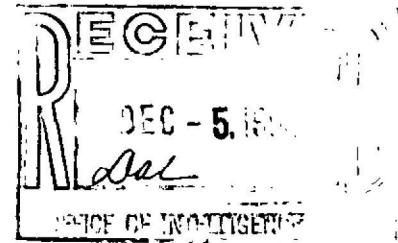
NATIONAL SECURITY AGENCY  
CENTRAL SECURITY SERVICE

FORT GEORGE G. MEADE, MARYLAND 20755 -6000

Serial: N2009

30 November 1984

The Honorable William French Smith  
The Attorney General  
Department of Justice  
Constitution Avenue & Tenth Street, N.W.  
Washington, D.C.




Dear Mr. Attorney General:

~~(S-000)~~ This letter forwards a revision of draft procedures governing the monitoring of radio communications of suspected international narcotics traffickers by the National Security Agency/Central Security Service (NSA/CSS). The draft procedures were initially submitted for your review and approval pursuant to Executive Order 12333 on 12 April 1984.

~~(S-000)~~ This version is the result of negotiations between my General Counsel's staff and the staff of your Counsel for Intelligence Policy. I concur in the procedures and request that you approve them.

(U) Should you or your staff have any questions concerning this revision, please contact Michael A. Smith, Assistant General Counsel (Operations), telephone number 688-6705.

Sincerely,

*for*   
LINCOLN D. FAURER  
Lieutenant General, USAF  
Director, NSA/Chief, CSS

Encl:  
a/s

Downgrade to S-7H2000  
upon removal of enclosure(s).

~~Classified by NSA/CSSM 123-2~~  
~~Declassify on: Originating Agency's Determination Required~~

~~Handle Via Comint Channels Only~~  
~~TOP SECRET~~

TAB  
"A"

~~TOP SECRET~~

APPENDIX A TO THE CLASSIFIED ANNEX  
TO DEPARTMENT OF DEFENSE PROCEDURES UNDER  
EXECUTIVE ORDER 12333

Procedures for Monitoring Radio Communications of Suspected  
International Narcotics Traffickers

I. Purpose and Scope

These procedures implement Sections 2.3 and 2.6(b) of Executive Order 12333 and Sections 372 and 374 of Title 10, United States Code. They regulate Communications Intelligence (COMINT) activities of the United States Signals Intelligence (SIGINT) System (USSS) directed against radio communications of suspected international narcotics traffickers. Nothing contained in these procedures affects the basic authority of the USSS to collect and disseminate foreign intelligence regarding aspects of international narcotics trafficking activities, including financial activities, other than those expressly addressed herein. SIGINT activities directed against international narcotics traffickers or trafficking activities that are not within the purview of these procedures are regulated by Department of Defense Regulation 5240.1-R.

II. Definitions

~~Classified by 504/0001-100-1~~  
~~Declassify and Downgrade Agency's Determination Required~~

~~Handle Via Combat Channels Only~~  
~~TOP SECRET~~

Unless contradicted or otherwise supplemented by the following definitions, the definitions contained in the Appendix to the DoD Procedures are applicable to these procedures:

International Narcotics Trafficker: Any person engaged in buying, selling, manufacturing (to include any step in the process from cultivation to refining), or transporting controlled substances as defined by the Attorney General, where such activities cross international boundaries.

~~TOP SECRET~~

EO 3.3b(3)  
PL 86-36/50 USC 3605



Wire Communication: Any communication carried in whole or in part by wire, cable or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications. The USSS may intentionally intercept communications of a U.S. person under circumstances where there is a reasonable expectation of privacy (e.g., a wire communication) only with prior authorization of the Attorney General, an order of the Foreign Intelligence Surveillance Court, or prior consent of the U.S. person.

United States: When used in a geographic sense, the term, "United States," means all areas under the territorial sovereignty of the United States, including the Commonwealth of Puerto Rico and the U.S. Virgin Islands.

Territorial Limits: The waters and airspace adjacent to the United States, its territories and possessions, to a distance of twelve miles from the coastline. A communications terminal whose location has not otherwise been determined will be deemed a terminal outside the territorial limits unless the

~~Handle Via Comint Channels Only~~  
~~TOP SECRET~~

~~TOP SECRET~~

nature of the communications or other indicia in the contents or circumstances of such communications give rise to a reasonable belief that such a terminal is located inside the territorial limits of the United States.

### III. Procedures

#### A. SIGINT Activities Directed Against Trafficker Communications When All Communicants Are Located Outside the Territorial Limits

1. Collection. The USSS is authorized to intercept and to perform direction finding of the radio communications of any person whom the USSS reasonably suspects to be engaged in international narcotics trafficking activities when all terminals of such communications are located outside the territorial limits. Such interception may be performed in response to foreign intelligence requirements approved by the Director of Central Intelligence or, with the prior approval of the Director, NSA, or his designee, in response to requests to the Secretary of Defense for information from the heads of federal law enforcement agencies; such requests may be on a program basis. The authority to intercept intentionally such communications does not extend to those communications for which there exists a reasonable basis for belief that all parties

~~Handle Via Comint Channels Only~~  
~~TOP SECRET~~

~~TOP SECRET~~

EO 3.3b(3)  
PL 86-36/50 USC 3605

thereto are United States persons, except that such communications may be intentionally intercepted if at least one terminal thereof is a [ ] and the communications contain information concerning [ ] of illicit narcotics shipments.

2. Retention. Information that identifies United States persons obtained in the course of collection described in III.A.1. may be retained no longer than one year from the date of intercept unless:

- (a) the Deputy Director for Operations approves a longer retention period as required to support traffic analytic data bases;
- (b) the information is disseminated in accordance with III.A.3., in which case retention is authorized for a period deemed necessary to satisfy analytic requirements;
- (c) the communication in which the information appears is encrypted or is reasonably believed to contain a secret meaning, in which case retention for an indefinite period is authorized; or




~~Handle Via Comint Channels Only~~  
~~TOP SECRET~~



~~TOP SECRET~~

EO 3.3b(3)  
PL 86-36/50 USC 3605



3. Dissemination. Dissemination of foreign communications of or concerning United States persons is governed by Procedure 4 of DoD Regulation 5240.1-R and Section 4.A.4(a)-(1) of the Classified Annex to Part 3, Procedure 5 of DoD Regulation 5240.1-R; provided, however, that information concerning the  of illicit narcotics shipments may be disseminated to Federal law enforcement agencies that have subject matter jurisdiction. Access to technical data bases will be restricted to signals intelligence collection and analytic personnel. Requests for access from other personnel or entities shall be referred to the Deputy Director for Operations, National Security Agency. Communications in which all communicants are United States persons shall be disposed of upon recognition, provided that technical data concerning frequency and channel usage may be retained for collection avoidance purposes and such technical data may be disseminated to appropriate federal law enforcement agencies, and provided further that information concerning the  of illicit narcotics shipments may be disseminated to federal law enforcement agencies when at least one terminal of the targeted communication 



~~Handle Via Comint Channels Only~~

~~TOP SECRET~~

~~TOP SECRET~~

EO 3.3b(3)  
PL 86-36/50 USC 3605

B. SIGINT Activities Directed Against Trafficker  
Communications When All Communicants Are Located Inside  
the Territorial Limits

1. Collection. The USSS is authorized to intercept and to perform direction finding of the [redacted]

[redacted] person reasonably suspected to be engaged in narcotics trafficking activities at the time of such interception, when all terminals are located inside the territorial limits of the United States and at least one terminal [redacted] inside the territorial limits [redacted]

[redacted] solely for the purpose of acquiring information relating to the movement of illicit narcotics shipments. Such interception may be performed only with the prior approval of the Director, NSA, or his designee, in response to requests to the Secretary of Defense for information concerning the [redacted] of illicit narcotics shipments from the heads of federal law enforcement agencies; such requests may be on a program basis.

2. Retention. Information that identifies United States persons obtained in the course of collection described in III.B.1. may be retained no longer than one year from the date of the intercept unless:

~~Handle Via Comint Channels Only~~  
~~TOP SECRET~~

~~TOP SECRET~~

EO 3.3b(3)  
PL 86-36/50 USC 3605

(a) the Deputy Director for Operations approves a longer retention period as required to support traffic analytic data bases;

(b) the information is disseminated in accordance with III.B.3., in which case retention is authorized for a period deemed necessary to satisfy analytic requirements;

(c) the communication in which the information appears is encrypted or is reasonably believed to contain a secret meaning, in which case retention for an indefinite period is authorized; or



3. Dissemination. Communications collected in accordance with III.B.1 may be disseminated only to federal law enforcement agencies with subject matter jurisdiction, and only insofar as such communications relate to the [redacted] of illicit narcotics shipments. Technical data concerning frequency and channel usage and direction finding results may be disseminated to appropriate law enforcement agencies even when the underlying communication does not contain [redacted] In the

~~Handle Via Comint Channels Only~~  
~~TOP SECRET~~

event that, pursuant to III.B.1., the USSS collects information revealing a threat to human life or physical safety, or significant foreign intelligence or counterintelligence affecting substantial national security interests, such information may be disseminated, upon prior approval of the Director, NSA, to appropriate federal authorities.

C. SIGINT Activities Directed Against Trafficker Communications When Some Communicants Are Located Inside and Others Outside the Territorial Limits

1. Collection. The USSS is authorized to intercept and perform direction finding of the radio communications of any person whom the USSS reasonably suspects to be engaged in international narcotics trafficking activities when some terminals of such communications are located inside the territorial limits of the United States and other terminals are located outside the territorial limits. Such interception may be performed in response to foreign intelligence requirements approved by the Director of Central Intelligence or, with the prior approval of the Director, NSA or his designee, in response to requests to the Secretary of Defense for information from the heads of federal law enforcement agencies; such requests may be on a program basis. The radio communications terminals that are located within the territorial limits of the United States and

~~TOP SECRET~~

EO 3.3b(3)  
PL 86-36/50 USC 3605

are engaged in communications with terminals outside the territorial limits may not be targeted [redacted]  
[redacted] inside the territorial limits but [redacted] and such targeting is approved by the Director, NSA, or his designee.

2. Retention. Information that identifies United States persons obtained in the course of collection described in III.C.1. may be retained no longer than one year from the date of intercept unless:

(a) the Deputy Director for Operations approves a longer retention period as required to support traffic analytic data bases;

(b) the information is disseminated in accordance with III.C.3., in which case retention is authorized for a period deemed necessary to satisfy analytic requirements;

(c) the communication in which the information appears is encrypted or is reasonably believed to contain a secret meaning, in which case retention for an indefinite period is authorized; or

~~Handle Via Comint Channels Only~~

~~TOP SECRET~~



3. Dissemination. With respect to terminals located outside the territorial limits, all information of or concerning United States persons, including contents, derived from the monitoring thereof shall be disseminated in accordance with Procedure 4 of DoD Regulation 5240.1-R and Section 4.A.4.(a)-(1) of the Classified Annex to Part 3, Procedure 5 of DoD Regulation 5240.1-R provided, however, that information concerning the [redacted] of illicit narcotics shipments may be disseminated to federal law enforcement agencies that have subject matter jurisdiction. With respect to terminals located inside the territorial limits, information derived from the monitoring thereof may be disseminated only to federal law enforcement agencies, and only insofar as such communications relate to the [redacted] of illicit narcotics shipments. With respect to those communications for which there exists a reasonable belief that all parties thereto are United States persons, information derived from the monitoring thereof may be disseminated only to federal law enforcement agencies, and only insofar as such communications relate to the [redacted] of illicit narcotics shipments. Technical data concerning frequency and channel usage and direction finding results derived from any communications monitored under III.C.1. may be disseminated to



~~TOP SECRET~~

appropriate law enforcement agencies. In the event that, pursuant to III.C.1., the USSS collects information, regardless of the location of the targeted terminal, which reveals a threat to human life or physical safety, or significant foreign intelligence or counterintelligence affecting substantial national security interests, such information may be disseminated upon prior approval of the Director, NSA, to appropriate federal authorities.

APPROVED BY:

Carol E. Dinkins  
Carol E. Dinkins  
Acting Attorney General

DATE:

December 21, 1984

~~HANDLE VIA COMINT CHANNELS~~  
~~TOP SECRET~~



~~SECRET~~ HANDLE VIA COMINT  
CONTROL SYSTEM ONLY

Office of the Attorney General  
Washington, D. C. 20530

December 21, 1984

Lt. General Lincoln D. Faurer  
Director  
National Security Agency  
Fort George G. Meade, Md. 20755

Re: Appendix A to the Classified Annex  
to Department of Defense Procedures  
Under Executive Order 12333

Dear General Faurer:

I have approved the proposed procedures you forwarded on November 30, 1984 to govern monitoring by the National Security Agency of the radio communications of suspected international narcotics traffickers in or over the territorial waters of the United States or foreign and international waters. This program of direct and incidental support to law enforcement authorities, to the full extent permitted by law, should contribute greatly to the national effort to combat international narcotics activities. ~~(S//NFCCO)~~

We appreciate the valuable assistance and cooperation of Michael A. Smith and Marshall L. Brown of your General Counsel's Office in the development of this procedure. (U)

Sincerely,

*Carol E. Dinkins*

Carol E. Dinkins  
Acting Attorney General

~~Classified by Derivative: Letter to Attorney General  
dtd. 11/30/01 from Director, NSA.  
Declassify On: OADR.~~

~~SECRET~~ HANDLE VIA COMINT  
CONTROL SYSTEM ONLY

TAB  
"B"

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

Washington, D.C. 20530

May 12, 1983

MEMORANDUM FOR JON T. ANDERSON  
General Counsel  
National Security Agency

Re: Content Monitoring of Radio Communications of  
Suspected International Narcotics Traffickers  
by U.S. Signals Intelligence System ~~(S//NFVCCO)~~

Conclusion

Your letter of February 16, 1983 requests my opinion regarding whether the U.S. Signals Intelligence System (USSS) possesses the legal authority to intercept and disseminate the radio communications of suspected international narcotics traffickers operating in the Caribbean and other areas in closer proximity to the United States. As explained further below, there is a reasonable and legitimate foreign intelligence interest in such communications when the activity is targeted against air and sea vessels on, in or over foreign waters or the high seas. Under those circumstances, the USSS possesses the legal authority to intercept such communications and disseminate their contents to CIA and other agencies for foreign intelligence purposes. The contents of such communications may also be disseminated for law enforcement purposes to the Coast Guard and Customs Service, as well as any other federal agency possessing requisite jurisdiction, pursuant to well-settled legal principles permitting the incidental use for law enforcement purposes of information lawfully collected for foreign intelligence purposes. ~~(S//NFVCCO)~~

As these vessels approach and enter U.S. territorial waters or airspace, however, the foreign intelligence interest diminishes to the point where the activity must be premised upon and consistent with the legal authorities controlling provision of law enforcement assistance by intelligence agencies and the military. These authorities require that dissemination of the

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

~~Classified By Derivative. Letter to Counsel for  
Intelligence Policy, dated 16 Feb. 1983, from the General  
Counsel, NSA (OSRINB. 6C/030/83)  
Declassify On: OADR~~

TAB  
"C"

See:  
OIPR 2007;  
OIPR 2239

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

- 2 -

contents of these communications be limited, as a general rule, to information that relates to the [REDACTED]

~~(S//NFCCO)~~

Inasmuch as the current Attorney General-approved procedures governing signals intelligence activities do not apply to the proposed activity, I recommend that our respective staffs develop appropriate new procedures for promulgation by the Director of NSA and approval by the Attorney General under Executive Order 12333. (U)

### Analysis

The proposal to authorize the USSS to intercept and disseminate radio communications [REDACTED] suspected of engaging in international narcotics trafficking involves both foreign intelligence and law enforcement interests. As we discussed in our meeting of February 2, as these vessels leave their Caribbean and other foreign sources of narcotics and move toward the United States the foreign intelligence interest in information regarding international narcotics production and trafficking diminishes until a point where relying on that interest as the basis for the intercept activity may no longer be reasonable. While this point is not necessarily identifiable geographically with precision, it would seem that the twelve-mile limit from the U.S. coast should serve presumptively as the location at which the nature of the surveillance shifts to law enforcement. In other words, once vessels cross this point and enter U.S. territorial waters or airspace, the attenuated or nonexistent foreign intelligence interest and the likelihood that the intercepted communications will be exploited more or less exclusively for criminal investigative purposes and prosecutions require that the authorities and limitations that relate to USSS involvement in law enforcement activities be applied to the intercept program.

~~(S//NFCCO)~~

While air and sea vessels are on, in or over foreign waters or the high seas, the foreign intelligence interest in the surveillance is apparent. In those circumstances the legal authorities governing the foreign intelligence activities of the USSS should regulate the proposed activity. As you know, the CIA is authorized by Executive Order 12333 to collect, produce and disseminate intelligence on the foreign aspects of narcotics

1/ This is not to say, however, that in the unlikely event the USSS under these circumstances acquires information revealing a threat to human life or physical safety, or significant foreign intelligence or counterintelligence affecting substantial national security interests, it is precluded from disseminating such information to appropriate authorities.

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

- 3 -

production and trafficking. § 1.8(b). The Order also authorizes the DCI generally to establish mechanisms to translate national foreign intelligence objectives into specific collection guidance for other agencies within the Intelligence Community. § 1.5(m). Section 1.4(c) of the Order authorizes the intelligence agencies generally, consistent with law and the other provisions of the Order, to collect information and conduct activities concerning, and to protect against, international narcotics activities. Further, NSA has been authorized by the President, in connection with [redacted] to collect and disseminate information regarding international narcotics production and trafficking as part of its foreign intelligence mission under section 1.12(b)(3). Thus, it seems clear that the USSS may intercept and disseminate radio communications [redacted] engaging in international narcotics trafficking while on, in or over foreign waters or the high seas pursuant to CIA tasking for foreign intelligence purposes. Once such communications have been intercepted for foreign intelligence purposes, the incidental dissemination and use of their contents for law enforcement purposes is permissible, as recognized in your letter, pursuant to well-settled legal principles.<sup>2/</sup> ~~(S//NFCCO)~~

As such vessels leave foreign or international waters and enter U.S. territorial waters or airspace, however, the legitimacy of any asserted foreign intelligence interest may become questionable and the law enforcement interest can no longer reasonably be termed incidental. At that point, the nature of the activity is altered and should be viewed as assistance to law enforcement authorities. This requires that the legal restraints on provision of such assistance by the USSS be considered. ~~(S//NFCCO)~~

Section 2.6(b) of Executive Order 12333 authorizes agencies within the Intelligence Community to participate, "unless otherwise precluded by law or [the] Order," in law enforcement activities to investigate or prevent international narcotics activities. There appears to be no provision in the Order that would apply to limit or prohibit USSS assistance in the form of interception of radio communications to which there is attached no reasonable expectation of privacy. Thus, this section and section 1.4(c) provide the basic authority for the proposed USSS activity unless it is otherwise limited by relevant constitutional or statutory provisions. ~~(S//NFCCO)~~

<sup>2/</sup> See, e.g., United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980), cert. denied, 454 U.S. 1144 (1982).

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

- 4 -

As discussed in our memorandum of March 23, 1982, the radio communications in question do not involve a reasonable expectation of privacy for Fourth Amendment purposes.<sup>3/</sup> Accordingly, there is no constitutional bar to acquisition of such communications by the USSS. Dissemination of communications once lawfully acquired is likewise constitutionally permissible.<sup>4/</sup> (U)

As for statutory considerations, the Posse Comitatus Act, 18 U.S.C. § 1385, may apply to limit the USSS activity to the extent military elements are involved in the proposed intercept program. That act makes the use of the Army or Air Force to "execute the laws" a felony, except in cases or under circumstances expressly authorized by Congress. The Navy has promulgated a regulation, SECNAVIST 5820.7 (May 5, 1974), that extends the basic limitations of the Act to the Navy while providing for exceptions with the specific approval of the Secretary of the Navy. To determine whether the contemplated assistance would violate the Posse Comitatus Act and Navy regulation it is necessary to consider the limitations of the Act in the context of the proposed activity. (U)

While it is fairly clear from the case law that has developed under the Posse Comitatus Act that the armed forces lawfully may provide certain types of assistance to law enforcement authorities, the decisions are unclear and inconsistent regarding the exact nature and scope of the assistance that may be rendered.<sup>5/</sup> Accordingly, it is helpful to examine the portions of the 1982 Department of Defense Authorization Act that were enacted as sections 371 through 378 of Title 10, United States Code. These provisions were intended to codify the principles that had been developed by the courts under Posse Comitatus and to clarify them in a manner that would facilitate use of the armed services to combat narcotics trafficking. (U)

Section 372 authorizes the Secretary of Defense to make available any equipment to any law enforcement official for law enforcement purposes. Section 374(a) provides, *inter alia*, that the Secretary of Defense may assign personnel to operate and maintain such equipment for the purpose of enforcing federal

3/ See United States v. Hall, 488 F.2d 193 (9th Cir. 1973); United States v. Rose, 669 F.2d 23 (1st Cir. 1982).

4/ See, e.g., Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982).

5/ See Report of the House Committee on the Judiciary, "Department of Defense Authorization Act, 1982," H. Rpt. 97-71, Pt. 2, 97th Cong., 1st Sess., pp. 4-7, and cases cited therein.



~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

- 5 -

narcotics laws upon request of the head of an agency with jurisdiction to enforce those laws. However, section 374(b) limits the assistance that may be rendered under section 374(a) by providing that, except in emergency circumstances,

equipment made available under section 372 of this title may be operated by or with the assistance of personnel assigned under subsection (a) only to the extent the equipment is used for monitoring and communicating [REDACTED]

Thus, intercept equipment may be provided, operated and maintained without violating the relevant law so long as operation is limited to "monitoring and communicating the [REDACTED] The unsettled issue, as your letter recognizes, is whether that language comprehends the acquisition and dissemination of the contents of the radio communications of the targeted vessels, or whether the authorized activity is limited to direction-finding only. (S//NF000)

We believe section 374(b) should be read to permit the interception and dissemination of the contents of the targeted communications to the extent those contents reflect the [REDACTED] and that the term should not be narrowly construed as limited, in practical effect, only to content that is necessary for direction-finding. [REDACTED]

[REDACTED] While the term may well logically include additional types of information, it is difficult to be more explicit regarding the nature of information that may be permissibly intercepted and disseminated for law enforcement purposes without reviewing samples of the various types of communications that can reasonably be expected to be acquired. (S//NF000)

As noted above, requests for assistance under section 374 must be made to the Secretary of Defense by the respective Cabinet-level officials heading the law enforcement agencies with jurisdiction to enforce the narcotics laws. It is my opinion that such requests may be made on a program-wide basis for the purposes of the proposed intercept activities. (S//NF000)

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

- 6 -

One further consideration is added by section 375 of the Title 10 amendments. That section requires the Secretary of Defense to issue regulations to ensure that assistance provided under the Act

does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search or seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

Since the communications at issue involve no reasonable expectations of privacy, it is clear that the proposed activity does not constitute a "search and seizure." Furthermore, the proposed activity contemplates neither interdiction of vessels or aircraft nor any other activity involving confrontation between armed forces and suspected traffickers. Accordingly, it appears that the proposed activity would not constitute a violation of section 375. If section 375 is deemed, in effect, to be a mere restatement of the essence of the Posse Comitatus Act, then it follows that the proposed activity is lawful under section 2.6(b) of Executive Order 12333 since it would not be precluded by law or the Order. ~~(S//NF000)~~

On the other hand, there exists support in the case law for the proposition that the Posse Comitatus Act prohibits certain activities in addition to searches and seizures and other direct confrontations between military forces [REDACTED]

[REDACTED] It is quite possible that a court would find a systematic program involving the armed services in the interception and dissemination of the contents of purely domestic radio communications [REDACTED]

[REDACTED] for law enforcement purposes to be violative of the Posse Comitatus Act, notwithstanding the Title 10 amendments or the fact that the activity involves neither searches or seizures nor direct confrontations between the armed forces and civilian targets. Accordingly, that the proposed activity would not be prohibited by section 375 does not necessarily mean that interception and

5/ Compare United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974), and United States v. Jaramillo, 380 F. Supp. 1375 (D.Neb. 1974), appeal denied, 510 F.2d 808 (8th Cir. 1975), with United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975), aff'd sub nom. United States v. Caspar, 541 F.2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

- 7 -

dissemination of the contents of radio communications between

[redacted] would not constitute a violation of the Posse Comitatus Act in any conceivable circumstances. The safe course, therefore, would appear to be to limit USSS activities as narrowly as possible to those that the Congress has specifically authorized in sections 371-374 of the Authorization Act. Thus, contents of communications that cannot reasonably be characterized as foreign intelligence or as relating to the "movement" of the vessels in question should not be disseminated as part of this program. (S//NFCCC)

Your letter also raises the question whether the communications of U.S. persons may be intentionally "targeted" under this program. I understand "targeting," for this purpose, to mean focusing on communications of identifiable U.S. persons

[redacted] under circumstances in which such information has been provided by informants or ascertained by the USSS in the course of conducting this program. It is my opinion that since such communications are public and the communicants enjoy no reasonable expectations of privacy, interception of them by the USSS raises no additional legal issues and is therefore permissible. Dissemination of the contents of such communications should, as stated above, be limited to foreign intelligence or information relating to the [redacted] of the trafficking vessels. (S//NFCCC)

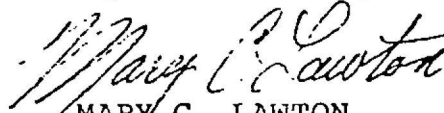
Finally, a new procedure should be promulgated by the NSA Director and approved by the Attorney General to govern this activity and ensure that it is clearly authorized and conducted in a reasonable manner. The current DoD procedure governing signals intelligence activities governs only nonpublic communications. Procedures Governing Activities of DoD Intelligence Components that Affect United States Persons, December 1982, DoD 5240.1-R, p. 5-5, § B.2. Furthermore, the classified annex to the procedure reflects a policy that the USSS should not intercept deliberately communications from, or intended for receipt by, United States persons. Id., Classified Annex, p. A-8, § 3. Since United States persons may be involved at all levels of the activity to be monitored and the communicants manning the U.S.-based radio stations are presumptively United States persons under the NSA procedure, the provisions of the current procedure would appear to inhibit NSA's involve-

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~

- 8 -

ment. Accordingly, in order to ensure that appropriate safeguards are applied to U.S. person information and that U.S. persons are not targets of the activity except as explained above or in accordance with Attorney General-approved procedures under Executive Order 12333, I suggest that our respective staffs develop appropriate procedures for promulgation by the NSA Director and approval by the Attorney General. ~~(S//NF000)~~



MARY C. LAWTON

Counsel for Intelligence Policy  
Office of Intelligence Policy and Review

~~SECRET/HANDLE VIA COMINT CHANNELS ONLY~~