THE WHITE HOUSE

WASHINGTON

April 13, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Administration Floor Position on the Brooks Wiretap Bill, H.R. 4620

OMB has asked for our views by close of business April 16 on an Administration floor position on H.R. 4620, as reported by the Government Operations Committee. As reported H.R. 4620 would essentially codify the GSA regulations prohibiting federal officers or employees from recording telephone conversations on the federal telephone system without the consent of all parties. Unlike the regulations, however, the bill would impose a penalty for a violation -- a fine of up to $10,000 and/or imprisonment for up to one year, and mandatory forfeiture of office or employment with the United States. This penalty provision was added at committee markup, taking the place of a provision that would have subjected recordings or transcripts of recordings made in violation of the act to the Privacy Act.

As you know, the Department of Justice is apoplectic about the presentation of Administration views on H.R. 4620. Justice's detailed objections to the bill -- based on its adverse effects on law enforcement -- were fully communicated to OMB prior to Committee markup, but OMB -- acting on its own without support from any affected agency -- refused to allow those objections to be shared with the Committee. OMB based its position on purported appearance problems associated with opposition to the bill, and a previously delivered report in which GSA stated that it had no objection to codification of the regulations, although other agencies might have reservations about the bill. Justice notes that the "no objection to codification" position was added by OMB after circulation of the GSA proposed report, and was only cleared telephonically by a staff-level employee at Justice. (Incidentally, our office was provided with an opportunity to review only the circulated version of the GSA testimony, opposing codification. We did not even get the telephone call Justice did.)

As we have discussed, I have prepared a memorandum for OMB, recommending that the Administration oppose the bill for the reasons articulated by Justice and the other affected agencies. Regardless of whether OMB is right that Justice

should have been more careful to catch the GSA revised testimony, or Justice is right that OMB manipulated the clearance process to pursue its own agenda, it was irresponsible for OMB to permit the bill to be reported without making the Committee aware of the deeply-held objections of Justice and Treasury, objections raised by those agencies with OMB well before markup.

Attachment

THE WHITE HOUSE

WASHINGTON

April 13, 1984

MEMORANDUM FOR JAMES C. MURR
CHIEF, ECONOMICS-SCIENCE-GENERAL GOVERNMENT
BRANCH, OMB

FROM: Orig. signed by FFF
FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Administration Floor Position on the Brooks Wiretap Bill, H.R. 4620

Counsel's Office has reviewed the above-referenced bill reported by the Government Operations Committee. We recommend that the Administration oppose the bill for the reasons that have been articulated by the Department of Justice and other affected agencies. It is unfortunate that those reasons were not shared with the Committee prior to the reporting of the bill. Whatever the reasons for that, Justice's objections -- and those of the other affected agencies -- are of sufficient magnitude that they should be voiced and the bill opposed.

FFF:JGR:aea 4/13/84
cc: FFFielding;JGRoberts/Subj/Chron

cc: Richard G. Darman

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

SPECIAL

April 11, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of Justice (Attention: James Knapp)
Department of the Treasury (Attention: Robert Powis)
Department of Defense (Attention: Bill Snider and Al Franklin)
Central Intelligence Agency (Attention: Rob Davis)
General Services Administration (Attention: Frank Carr)
National Security Council

SUBJECT: House Government Operations Committee markup of H.R. 4620, "Federal Telecommunications Privacy Act of 1984".

Attached is a copy of the subject bill as ordered reported by the House Government Operations Committee. Please advise us no later than COB - MONDAY, APRIL 16, 1984, of your agency's recommendation for an Administration position on this legislation should it be considered by the full House. This is a firm deadline.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Connie Horner
Mike Horowitz
Mary Ann Chaffee
Frank Seidl
Frank Reeder
Arnie Donahue
John Roberts

AMENDMENT IN THE NATURE OF A SUBSTITUTE

TO H.R. 4620 OFFERED BY MR. BROOKS

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the ''Federal Telecommunications Privacy Act of 1984''.

SEC. 2. Title I of the Federal Property and Administrative Services Act of 1949 is amended by adding at the end thereof the following new section:

''RECORDING OF CONVERSATIONS ON FEDERAL TELECOMMUNICATIONS SYSTEM

''SEC. 113. (a)(1) Except as provided in subsections (b), (c), and (d), no Federal officer or employee shall cause or permit the recording of, or listening-in upon, any conversation conducted on the Federal telecommunications system established under section 7 of the Act of June 14, 1946 (40 U.S.C. 295), or made available under section 110 of this Act.

''(2) Except as provided in subsections (b), (c), and (d), no Federal officer or employee shall cause or permit the recording of, or listening-in upon, any conversation conducted on any other telecommunications system if the conversation (A) is between a Federal officer or employee and any other person and (B) involves the conduct of Government business.

''(b) Without the consent of any party to a conversation, the recording of, or listening-in upon, such conversation may be conducted notwithstanding subsection (a) if such recording or listening-in is authorized under, and conducted in accordance with the requirements of, the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et seq.), the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), or other applicable law.

''(c) With the consent of one party to a conversation, the recording of, or listening-in upon, such conversation may be conducted notwithstanding subsection (a) if the recording or listening-in is performed in accordance with the following conditions:

''(1) The recording or listening-in is performed for law enforcement purposes in accordance with procedures established by the agency head, as required by the Attorney General's guidelines for the administration of the Omnibus Crime Control and Safe Streets Act of 1968, and in accordance with procedures established by the Attorney General.

''(2) The recording or listening-in is performed for counterintelligence purposes and approved by the Attorney General or the Attorney General's designee.

''(3) The recording or listening-in is performed at

a military command center for the purpose of ensuring the accuracy of verbal instructions to operating elements and preserving a record of such instructions to enhance the command and control of such elements.

''(4) The recording or listening-in is performed outside the United States for counterterrorism purposes and approved by the Secretary of State or the designee of the Secretary of State.

''(5) The recording or listening-in is performed by any Federal employee for public safety purposes and documented by a written determination of the agency head or the designee that cites the public safety needs and identifies the segment of the public needing protection and cites examples of the hurt, injury, danger, or risks from which the public is to be protected.

''(6) The recording or listening-in is performed by a handicapped employee, provided a physician has certified (and the head of the agency or designee concurs) that the employee is physically handicapped and the head of the agency or designee determines that the use of a listening-in or recording device is required to fully perform the duties of the official position description. Equipment shall be for the exclusive use of the handicapped employee. The records of any interceptions by handicapped employees shall be used,

safeguarded, and destroyed (notwithstanding subsection (h) of this section) in accordance with appropriate agency records management and disposition systems.

''(7) The recording or listening-in is performed by any Federal agency for service monitoring but only after analysis of alternatives and a determination by the agency head or the agency head's designee that monitoring is required to effectively perform the agency mission. Strict controls shall be established and adhered to for this type of monitoring.

''(d) With the consent of all the parties to a conversation, the recording of, or listening-in upon, such conversation may be conducted notwithstanding subsection (a). This includes telephone conferences, secretarial recording, and other acceptable administrative practices. Strict supervisory controls shall be maintained to eliminate any possible abuse of this privilege. The agency head or the agency head's designee shall be informed of this capability for listening-in or recording telephone conversations.

''(e)(1) Each agency shall ensure that--

''(A) all listening-in or recording of telephone conversations pursuant to paragraph (5), (6), or (7) of subsection (c) shall have a written determination approved by the agency head or the agency head's designee before operations; and

''(B) service personnel who monitor listening-in or recording devices shall be designated in writing pursuant to paragraph (7) of subsection (c) and shall be provided with written policies covering telephone conversation monitoring which shall contain at a minimum the following instructions:

''(i) no telephone call shall be monitored unless the Federal agency has taken continuous positive action to inform the callers of the monitoring;

''(ii) no data identifying the caller shall be recorded by the monitoring party;

''(iii) the number of calls to be monitored shall be kept to the minimum necessary to compose a statistically valid sample;

''(iv) agencies using telephone instruments that are subject to being monitored shall conspicuously label them with a statement to that effect; and

''(v) since no identifying data of the calling party will be recorded, information obtained by the monitoring shall not be used against the calling party.

''(2) Current copies and subsequent changes of agency documentation, determinations, policies, and procedures supporting operations pursuant to paragraph (5), (6), or (7)

of subsection (c) shall be forwarded before the operational date to the General Services Administration. Specific telephones shall be identified in the documentation or determination to prevent any possible abuse of the authority.

''(3) Procedures for monitoring performed under paragraph (1) of subsection (c) shall contain at a minimum--

''(A) the identity of an agency official who is authorized to approve the actions in advance;

''(B) an emergency procedure for use when advance approval is not possible;

''(C) adequate documentation on all actions taken;

''(D) records administration and dissemination procedures; and

''(E) reporting requirements.

''(4) Requests to the General Services Administration for acquisition approval or installation of telephone listening-in or recording devices shall be accompanied by a determination as defined in subsection (j)(2).

''(5) Each agency shall ensure that a program is established to reevaluate at least every two years the need for each determination authorizing listening-in or recording of telephone conversations under this section.

''(f)(1) The General Services Administration shall periodically review the listening-in programs within the

agencies to ensure that agencies are complying with this section and the Federal property management regulations and shall undertake investigations concerning noncompliance with paragraphs (5), (6), and (7) of subsection (c).

''(2) The General Services Administration shall provide assistance to agencies in determining what communications devices fall within the listening-in or recording category. The General Services Administration shall also provide guidance and assistance in the development of administrative alternatives to the listening-in or recording of telephone conversations.

''(3) The General Services Administration shall take appropriate steps to obtain compliance with this section if an agency has not documented its devices in accordance with this section.

''(g) Any Federal officer or employee who causes or permits the recording of, or listening-in upon, any conversation in violation of this section shall be fined not more than $10,000, or imprisoned for not more than one year, or both; and shall forfeit his office and employment with the United States.

''(h) Any recording or transcript of a conversation made under (or in violation of) this section shall constitute a record deposited in a public office for purposes of section 2071 of title 18, United States Code, and shall not be

disposed of except in accordance with the procedures established under chapter 33 of title 44, United States Code.

''(i) The functions and responsibilities of the General Services Administration and of agency heads and agency heads' designees under this section shall not be delegated or assigned.

''(j) For purposes of this section--

''(1) the term 'Federal officer or employee' includes any officer or employee of a Federal agency;

''(2) the term 'determination' means a written document (usually a letter) that specifies the operational need for listening-in or recording of telephone conversations, indicates the specific system and location where it is to be performed, lists the number of telephones and recorders involved, establishes operating times and a specific expiration date, and justifies the use, and is signed by the agency head or the agency head's designee;

''(3) the term 'agency head's designee' means only the individual designated pursuant to section 3506(b) of title 44, United States Code.''.

ID # 261504 CU

JV

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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John
L keep w/ hmm
+ see me

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

Name of Correspondent: Robert A. McConnell

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

Subject: Background of Brooks Wiretap Bill, H.R. 4620

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU Holland	ORIGINATOR	84/04/11			/ /
	Referral Note:				
CU AT 18	A	84/04/12		S	84/04/22
	Referral Note:				
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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: Apr 11 84 Robert McConnell memo + Holland-French Smith + D. Lowell Jensen attached

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.

5/81

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 11, 1984

M E M O R A N D U M

TO: William French Smith
Attorney General

D. Lowell Jensen
Associate Attorney General

FROM: Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

SUBJECT: Background of Brooks Wiretap Bill, H.R. 4620

As OMB's process has now completely failed as a management tool and as a means for effective control of responsible government position development, I believe it most important that this memo be read. The OMB actions outlined are intollerable and the permission requested is unfortunate but necessary.

I. The Bill.

The subject bill was introduced by Chairman Brooks on January 24 purportedly as a response to the Charles Wick matter which involved recording of telephone communications without the consent of all parties. In summary, the Brooks bill would codify GSA regulations governing recording of telephone communications.

II. General Background.

Since the widely publicized recording of telephone conversations by Director Wick of USIA, several bills have been introduced in the Congress to prohibit one-party recording of communications. In the Senate, bills introduced by Senators Metzenbaum and Bumpers were offered as Floor amendments to the President's Comprehensive Crime Control Act, S. 1762. Through the efforts of the Department of Justice and CIA, these proposals were defeated by a vote of 51 to 41 on February 2. Since that time, Chairman Conyers of the House Judiciary Subcommittee on Criminal Justice has held a hearing on his bill, H.R. 4826 at which the Department of Justice testified in opposition to the Conyers bill via OMB-approved testimony on March 8.

III. Processing of the Brooks Bill.

A. The Subcommittee Hearing.

A hearing was scheduled on the Brooks bill for March 1, 1984 before the Subcommittee on Legislation and Security of House Government Operations. Those invited to testify included Mr. Wick and representatives of the General Services Administration (GSA) and the National Security Agency (NSA).

On February 27, OMB circulated testimony for GSA; on February 28, OMB circulated for review draft testimony for Mr. Wick and NSA. Understandably, Mr. Wick's testimony was personal in nature. The draft GSA and NSA testimony discussed the serious problems which would be created by the bill. We asked that the GSA testimony be revised to reflect the enormous problems which would be created by the provision of the bill which would make recordings of telephone communications subject to the Privacy Act of 1974. We also asked to make clear that we would, in due course, submit detailed comments to the Subcommittee concerning H.R. 4620. The GSA testimony was so revised but it was also modified to suggest that GSA would not object to codification of its regulations. OMB cleared this change by reading it over the telephone to staff-level employees of the Departments of Justice and Defense and representatives of the intelligence agencies. The Department of the Treasury, which has a vital interest in this issue, was never consulted at all on the issue.

In short, all affected Departments and agencies opposed H.R. 4620 because of its potential adverse effects upon law enforcement and intelligence operations, yet OMB, because of political concerns, engineered testimony at the March 1 hearing suggesting that the Administration had only technical problems with the legislation.

B. The Subcommittee Mark-Up.

On March 27, the Department of Justice submitted to OMB a detailed critique of H.R. 4620 stating that we strenuously opposed such legislation for law enforcement and intelligence reasons. This draft bill report was held up by OMB because it was conceived to be politically unwise and inconsistent with the impression of functional Administration support created by OMB at the March 1 hearing. A Subcommittee mark-up of H.R. 4620 was scheduled for April 3 and we sought OMB clearance of our bill report so that the Subcommittee would have the benefit of our views. Rather than clear our report, an April 2 meeting was scheduled by OMB at which point representatives of affected Departments and agencies were instructed to desist in opposing H.R. 4620 and to develop a package of technical amendments to the bill which would make it acceptable.

During that stormy April 2 OMB meeting, representatives of the Departments and agencies objected strenuously to this approach and were virtually unanimous in contending that H.R. 4620 was so ill conceived as not to lend itself to any "quick fix". Despite these objections, OMB pushed ahead suggesting that OMB would submit a package of technical amendments, state that the Administration had no objection to H.R. 4620 subject to the package of amendments, and release Executive departments and agencies to state their vigorous objections at the Subcommittee mark-up.

Once I informed the Attorney General's morning staff meeting of this determination, several policy-level officials took action. Associate Attorney General Jensen telephoned Deputy Director Wright of OMB complaining about this process. On April 3, the Attorney General wrote Director Stockman confirming our objections to the handling of H.R. 4620 by OMB. (A copy of that letter is attached.) Nevertheless, on April 3, the Subcommittee proceeded to mark-up and report H.R. 4620 without input from the Administration. The only major improvement made in the bill was deletion of the Privacy Act of 1974 provisions.

C. The Full Committee Mark-Up.

Pursuant to our urgent request for a policy-level meeting, a meeting was scheduled for April 9 at OMB to pursue the matter further. At that meeting, OMB reiterated that we could not oppose H.R. 4620 even though all Departments and agencies represented noted the serious problems with the bill and the virtual impossibility of developing amendments which would remedy all of the serious law enforcement and intelligence problems that it would produce. Department of Justice representatives urged clearance of the draft bill report submitted on March 27 as H.R. 4620 was scheduled for mark-up by full Committee the following day, April 10. OMB refused to clear the Justice bill report and indicated that the most we could do was to set out our concerns with the bill as drafted and suggest that we doubted that all of our concerns could be remedied through amendments. Our representatives at the meeting requested an opportunity to present this OMB proposal to policy-level Department officials.

Upon consideration within the Department, we proposed a compromise position. We suggested that we would redraft our bill report so that it would not "oppose" H.R. 4620 but rather:

(1) set out our detailed concerns with the bill;

(2) express our serious reservations about the wisdom of legislation in this area;

(3) express our doubts that our specific and general concerns can be remedied; and

(4) state that H.R. 4620 as reported by Subcommittee was not an acceptable effort to codify GSA regulations in this area.

This suggested approach was conveyed to OMB by telephone. Word soon came back that no Department report along these lines could be submitted to the Committee and that, rather, the full Committee mark-up would be allowed to proceed without input from the Administration.

Despite all of this I called Frank Horton, the ranking Republican on the full committee. He was generally sympathetic to our concerns but IRATE that we had not shared this information with him earlier. He said he did not care what OMB said but that he did care that the Administration had now allowed four Republicans to vote for a defective bill, they were now on record and all we could do was come up with amendments - the very posture OMB intended to force us into regardless of our contention that we could not amend successfully.

On April 10, the full House Government Operations Committee proceeded to mark-up and report H.R. 4620 without any formal report from the Departments of Justice and Treasury or the CIA. The bill was reported precisely as approved by Subcommittee. Members of the Committee were not even made aware, for example, that the law enforcement exception in H.R. 4620 purports to incorporate by reference a non-existent set of guidelines.

IV. Conclusion.

In short, OMB, based upon its stupid, myopic and arrogant analysis of the political consequences of opposing H.R. 4620, has overruled the law enforcement and intelligence objections of all affected Departments and agencies and engineered hearing testimony which created the impression that the Administration would not object to H.R. 4620 subject to technical amendments. Since that time, OMB has frustrated efforts by the Departments of Justice and Treasury as well as the Departments of Defense and the intelligence agencies, all of whom have sought to apprise the Committee of the serious law enforcement and intelligence problems with H.R. 4620. As a result, the bill has been processed on a "fast track" basis as Minority and Majority Members of the Committee alike assume that the Administration has no serious objections to H.R. 4620.

At the most recent meeting on this issue, OMB justified its current position as necessary to avoid having the Administration criticized for being inconsistent on this issue. In other words, OMB engineered a misleading hearing presentation on March 1 and now maintains that to oppose H.R. 4620 would be inconsistent with the OMB-revised testimony of GSA at the March 1 hearing. At the

same time, we flatly opposed the similar Metzenbaum-Baucus proposals on the Senate Floor in early February and flatly opposed the similar Conyers bill in OMB-approved testimony at the March 8 Conyers hearing. We would respectfully suggest that it was the OMB position on the Brooks bill which was inconsistent as we believe it is the policy of this Administration that law enforcement and intelligence operations will not be jeopardized for transient political considerations. To make matters worse, OMB, in its handling of H.R. 4620, has run rough-shod over law enforcement and intelligence agencies in what OMB perceives to be an effort to mollify the Members of Congress and the media who have gone out of their way to embarrass the Administration over the Wick matter. Although our concerns relate solely to law enforcement and intelligence considerations, we cannot help but note that the OMB handling of the Brooks bill, in addition to being a flagrant example of overreaching by OMB, is an example of bad politics. The system has failed in this instance and again is penalizing Departments that try to comply with the process. The time has come for a delegation to meet with Mr. Stockman and, I would suggest, Mr. Baker and Mr. Fielding and set out what will and will not be tolerated. In the meantime I request permission for an all out assault on H.R. 4620 regardless of OMB.

Attachment

cc: Stephen S. Trott
Theodore B. Olson
Mary C. Lawton

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

April 3, 1984

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Dave:

This is with respect to two items which I believe demand your immediate attention -- both of which are very troubling from the standpoint of this Department, and from the standpoint of an orderly management process for the Executive Branch.

I. PROPOSED DEMUTH TESTIMONY ON S. 2433, THE PAPERWORK REDUCTION ACT AMENDMENTS OF 1984

This bill, which was introduced in the Senate on March 15, 1984, contains the following provisions, among others: (1) it would establish the position of Administrator of the Office of Information and Regulatory Affairs (currently held by Christopher DeMuth) as one requiring appointment with advice and consent. Mr. DeMuth himself, however, could continue to hold that office without Senate confirmation; (2) OIRA is granted a four year authorization of appropriations; and (3) most importantly, it would require in subsection (g) that the Director of OMB make available to the public "any written material pertaining" to a rule or regulation submitted to OIRA by a rulemaking agency.

We have two serious concerns with respect to this bill:

(1) The disclosure provision in subsection (g) represents a sharp departure from traditional administrative practice within the Executive Branch. For many years, and through numerous Administrations, the Executive Branch has resisted routine disclosure of deliberative, policy-oriented communications transmitted between rulemaking agencies and the Executive Office of the President with respect to informal rulemaking. Under Article II, §3 of the Constitution, the President, as head of the Executive Branch, has a duty to "supervise and guide" Executive officers in "the construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. 52, 135 (1926). OIRA acts as the

President's delegate in the performance of this important constitutional duty. That office's capacity to provide appropriate policy supervision and guidance on behalf of the President would be substantially impaired if predecisional, deliberative communications were routinely disclosed. Moreover, this bill would do substantial harm to the informal rulemaking process established by the President under Executive Order 12291, which represents a primary mechanism by which the President, through OIRA, exercises his constitutional authority over Executive Branch informal rulemaking. The Department of Justice strongly opposes this provision.

(2) We have substantial reservations with respect to the provision establishing the Administrator of OIRA as a position requiring Senate confirmation. The Administrator functions, inter alia, as the President's spokesman on rulemaking matters within the Executive Branch, and we have serious policy reservations concerning Mr. DeMuth's proposed testimony which supports the additional congressional scrutiny of this officer's performance which Senate confirmation entails. The President should, whenever possible, retain plenary power over his appointments, particularly in the Executive Office of the President, and, as you know, the decisionmaking process is inevitably chilled and distorted when required to take place in a fishbowl.

Apparently, a prearranged "fast track" is in operation for this bill. Consequently, this Department's comments cannot be properly considered by OMB in time for a congressional hearing where Mr. DeMuth is scheduled to testify tomorrow. We did not receive a copy of Mr. DeMuth's testimony until today. We have also discovered that the testimony itself was delivered to the committee early this afternoon. This sequence of events certainly raises serious concerns regarding the integrity of the clearance process.

In light of the serious constitutional concerns raised by this bill, we urge that Mr. DeMuth be told not to testify at tomorrow's hearing and that time be allowed for careful Administration review of this legislation. If this is not possible there should be an immediate effort to resolve the dispute. Then an appropriate and cleared Administration report should be sent to the committee.

II. BROOKS WIRETAP BILL, H.R. 4620

The Brooks bill seeks to prohibit the type of one-party recording of telephone communications that was publicized in the Charles Wick case. In summary, the Brooks bill would codify existing GSA regulations governing one-party recording of telephone conversations involving the federal telecommunications system. In so doing it would adversely affect law enforcement and intelligence activities. We believe the Brooks bill is so ill conceived that it does not lend itself to a "quick fix" through

amendments. Despite these serious concerns, OMB staff planned to appear at the 2:00 p.m. mark-up of H.R. 4620 today to indicate that the Administration would support the bill if amended. We viewed this as depriving us of any opportunity to urge that the Administration oppose this bill.

Based upon our objections, it is my understanding that no Administration official appeared at the Subcommittee mark-up and the Subcommittee proceeded without us. We appreciate this forbearance and urge a policy-level meeting at an early date to discuss an appropriate Administration position on H.R. 4620.

I would appreciate your cooperation in making sure that the Administration's position on both bills is communicated properly. It does not seem to me that this Department's comments on the bills are inconsistent with the Administration's program -- on the contrary, we believe the Administration's program and philosophy require that our position on these two bills be adopted.

Sincerely,

Bill

William French Smith
Attorney General

U.S. Department of Justice

Assistant Attorney General
Legislative Affairs

RE: H.R. 3987 The National Archives and Records Administration Act

Bob,

The Department submitted a report to OMB on April 3, 1984 on H.R. 3987. OLA prepared the report with comments from OLC, JMD, FBI, CIVIL, OLP, and TAX.

H.R. 3987 has been reported from the Subcommittee on Legislation and National Security and it is pending before the House Government Operations Committee.

Yolanda

Sue - please attach this to copy of rept for me

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

APR 10 1984

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed Administration Support for Bill Infringing on Deliberative Process Integral to Executive Order 12291

This memorandum articulates in greater detail and places in historical context the reasons for our strong objections to Administration support, as expressed by the Office of Management and Budget, of two provisions of a bill, S. 2433, the "Paperwork Reduction Act Amendments of 1984." You communicated the Department's views to Director Stockman in your letter of April 3, 1984 and asked that OMB withdraw the scheduled testimony of Mr. DeMuth or arrange for an immediate Administration effort to resolve the dispute. OMB went forward with Mr. DeMuth's testimony notwithstanding your request. In fact, Mr. DeMuth expanded on the objectionable provisions at the hearing and agreed to support even more egregious "clarifying" amendments to the proposed legislation. It is not clear whether there is any chance to divert OMB from this highly self-destructive course, which could, at the same time, seriously impair the President's ability to manage the Government, but we feel we must make the effort. Hence this memorandum expands on our analysis of the offensive provisions.

As you are aware, the two offensive provisions would: first, require that all written memoranda or material generated within OMB or between OMB and a rulemaking agency in the course of OMB's review of a rulemaking of that agency pursuant to Executive Order 12291, including written material reflecting policy views, be placed on the publicly available docket of the rulemaking involved; 1/ and, second, that the position of

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1/ Subsection (g) reads as follows:

> "(1) Except as expressly provided by statute, the Director shall make available to the public, no later than the date on which any proposed or final rule or regulation reviewed by the Office of Information and Regulatory Affairs is published in the Federal Register-
>
> "(A) a copy of such rule or regulation; and

(footnote continues on next page)

Administrator for Information and Regulatory Affairs would be made an "advice and consent" position. Based on careful consideration of the history of Executive Order 12291, and taking into account various arguments by OMB supporting these two provisions that have been communicated informally to this Department, we continue to believe that the two provisions are fundamentally inconsistent with the theory underlying Executive Order 12291, that they raise substantial issues that go beyond that Executive Order, and that no Administration should support such provisions.

The final point may be the most important. This legislation weakens the presidency, and we have a duty to leave the Executive in at least as strong a position as we found it. I believe that President Reagan feels strongly that he is a trustee of the Presidency and that it has been weakened much too much already by Congress and some of his predecessors.

In early 1981, the Office of Management and Budget and this Department shared the concerns which your April 3 letter brought to Director Stockman's attention. Attorneys from this Office worked very closely with attorneys from OMB's Office of General Counsel and other OMB policy officials in drafting the Executive Order (No. 12291) which centralized rulemaking management in OMB. This was the President's key early effort to bring the regulatory process under control. All involved in the process at that time fully understood that the Executive Order was to constitute a delegation of the

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(footnote continues)

> "(B) any written material pertaining to such rule or regulation submitted to the Office by the agency proposing or promulgating such rule or regulation, or submitted by the Office of such agency, during the period of the agency rule-making or the review of such rule or regulation by the Office.
>
> "(2) The Director shall make the copies and materials described in paragraph (1) available to the public whether or not the review of a rule or regulation described in such paragraph is conducted pursuant to this chapter."

President's inherent constitutional power under Article II, § 3 of the Constitution to supervise and guide his subordinates in the exercise of their statutory responsibilities. The key practical and legal point made in the memorandum of the Office of Legal Counsel approving Executive Order 12291 on February 13, 1981 was that OMB was being brought into the rulemaking process as a full participant, acting on behalf of the President.

At the time of the drafting of Executive Order 12291, and subsequently, the question of the availability of deliberative documents generated within OMB in the 12291 review process was one of appropriately serious concern. That mutual concern resulted in the transmittal to Director Stockman of a memorandum from this Office of April 23, 1981 on the subject of "Contacts Between OMB and Executive Branch Agencies Pursuant to Executive Order 12291." In that memorandum, we stated as follows:

> "Your Office [OMB] surely participates in the deliberative process when it exercises the power of the President delegated to you to supervise and guide the agency by communicating factual analyses or legal and policy arguments. We believe the deliberative process is also implicated when your Office acts as a conduit for views of other Executive agencies, since these agencies are part of an integrated Executive Branch headed by the President."

We quote these two sentences here because we believe they place in context the practical impact of subsection (g) of this bill. As we discussed in our April 23, 1981 memorandum, the rulemaking process should be viewed as a unitary one in which OMB pursuant to the delegation in Executive Order 12291, or indeed the President himself, may participate in a direct, confidential manner in much the same way as each Cabinet officer would receive advice from his or her subordinates with respect to a particular proposed rule. The plain and simple result of subsection (g), at least for purposes of written communications (a point on which we will elaborate below), is to destroy the unitary rulemaking process envisioned both in the drafting of Executive Order 12291 and in our April 23, 1981 memorandum and to put OMB in essentially the same position as a private citizen.

Consistent with our memorandum of April 23, 1981, Director Stockman issued a "Memorandum for Heads of Executive Departments and Agencies" on June 11, 1981 (M-81-9), which maintained the

distinction between factual material relevant to a rulemaking and material reflecting the policy views of OMB.

There is no escaping the reality that if subsection (g) were to be enacted, OMB, executing the delegated power of the President, would be entitled to less confidentiality of its communications than officials within the rulemaking agency itself. That result is not only startling, but cuts against the grain not only of Executive Order 12291 but every articulation of the value of preserving the confidentiality of the Executive Branch's deliberative process of which we are aware. As recognized by the Supreme Court in 1974 in an analogous context,

> "[T]he valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties . . . is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."

United States v. Nixon, 418 U.S. 683, 705 (1974) (footnote omitted).

We believe it bears noting that our legal analysis supporting the carefully structured role of OMB in Executive Order 12291 set forth in our February 13, 1981 memorandum to Director Stockman, as well as our April 23, 1981 memorandum emphasizing the place of OMB within the rulemaking process, was subsequently given the unequivocal support of the United States Court of Appeals for the District of Columbia Circuit in Sierra Club v. Costle, 657 F.2d 298 (1981). In that case, some petitioners attacked the propriety of communications between the President, members of his staff and officials of the Environmental Protection Agency "which concerned the issues and options presented by the rulemaking." Id. at 404.

In rejecting this attack, the Court of Appeals captured the essence of the Executive Order 12291 process, even though the circumstances giving rise to that case arose prior to issuance of 12291:

"The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policy-making considered. The executive power under our Constitution, after all, is not shared -- it rests exclusively with the President. The idea of a 'plural executive,' or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President's control and supervision over the Executive Branch, the Constitution -- and its judicial gloss -- vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy. In the particular case of EPA, Presidential authority is clear since it has never been considered an 'independent agency,' but always part of the Executive Branch.

"The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive."

Id. at 405-06 (footnotes omitted).

In reaching its conclusion regarding the propriety of the challenged communications, the Court of Appeals drew the same basic distinction that this Office had drawn in our memorandum to Director Stockman of April 23, 1981 between "facts" and "opinion." 2/ As observed by the Court of Appeals, EPA had not in that case attempted to support the rule ultimately issued on the basis of any "information or data" communicated during the meeting involved. This Office had previously concluded that "the rulemaking agency need not disclose [OMB's] legal and policy arguments and analyses of the facts, but should generally disclose readily segregable factual material." April 23 memorandum at 8. In Director Stockman's "Memorandum for Heads of Executive Departments and Agencies" of June 11, 1981, supra, Mr. Stockman squarely embraced the rationale of Sierra Club v. Costle. This distinction was also drawn in precisely the same fashion by the Administration Conference of the United States in 1980. ACUS Recommendation 80-6, "Intra-governmental Communications on Informal Rulemaking Proceedings," 1 C.F.R. § 305.80-6 (1983).

If subsection (g) required only the placing of written factual information on the docket of a rulemaking proceeding, it would do little more than reflect current law and sound policy. It is not so limited, however, and instead would purport to require policy views to be placed on the record even though such policy views have been expressed by the President acting through OMB.

Because of the importance of the principle that the President and his advisers, including current officials of OMB and the persons entrusted in any particular President's term with carrying out duties such as those imposed under Executive Order 12291, should always be capable of engaging fully and freely in the deliberative process leading to decisions regarding promulagation of a rule, it is no answer to say that subsection (g) is acceptable because it applies only to written, as opposed to oral, communications. Even if

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2/ We note that this distinction was also drawn in the early fall of 1981 in the context of a request from a congressional committee for documents generated in the Executive Order 12291 review process. In counselling OMB with respect to that request, this Office assumed, and was assured by OMB, that the committee's request could be accommodated consistent with the need to protect the deliberative process because no documents requested by the Committee contained substantive policy advice.

OMB could confidently state that the deliberative process engaged in within the Executive Order 12291 process would never, under any circumstances, have to utilize written communications embodying policy advice, OMB could not justifiably draw that conclusion for future Administrations. More importantly, this Administration, in supporting subsection (g), effectively would subscribe both to the appropriateness of such a curb on the deliberative process in this context, and would accept a precedent which would, at least as a matter of logic, be as easily extended to cover the important deliberative processes in which other offices in the Executive Office of the President are constantly involved, including the National Security Council and the various Cabinet Councils.

It may be, of course, that Congress could constitutionally require most or all of the rulemaking process to be conducted in a fishbowl. That is a complicated question which we do not treat here and on which we intend no expression of opinion. Subsection (g) does not, of course, go that far but it is, in a sense, all the worse for not doing so because it places the maximum restraint on the deliberative process that occurs, under Executive Order 12291, between the delegate of the President and the rulemaking agency. It is, therefore, much more of an intrusion into the constitutional prerogatives of the President because it is squarely aimed at the President and his delegate, the Office of Management and Budget.

In the same fashion, the provision of the bill that would establish the Administrator of OMB's Office of Information and Regulatory Affairs as an "advice and consent" official is yet another means of undercutting the ability of the President to use an official in the Executive Office of the President as a personal adviser and representative whose accountability is to the President rather than to a congressional committee which has power to deny its consent in the confirmation process and to exercise oversight over that official once confirmed. Making this official an advice and consent position cannot possibly inure to the benefit of the President and it is incomprehensible to us why the Administration would support such a proposal.

It has been recently suggested to us informally by OMB that subsection (g) should be viewed as acceptable because it is much less offensive than other proposals which would assertedly have been much more intrusive on the deliberative process under Executive Order 12291. There are at least two conclusive responses to this argument. First, in the six years this Office has been commenting on and generally following

provisions such as subsection (g) in the context of so-called "Regulatory Reform" legislation, we have never been told, much less convinced, that both Houses of Congress would send a bill to the President that would have the practical effect of destroying the deliberative process that occurs in Executive Order 12291 review. We have certainly never been apprised that Chairman Rodino of the House Committee on the Judiciary would permit such a bill to be reported out of his committee. Thus, this threat of a new, draconian intrusion into the deliberative process strikes us as highly unlikely, although we could of course be convinced to the contrary by hard evidence that both Houses would be prepared to stand the Administrative Procedure Act on its head by giving low-level agency employees confidentiality in their deliberative communications but denying such confidentiality to the President and those acting directly on his behalf in the rulemaking process.

Second, we cannot believe that a bill containing such an intrusive device would not be very seriously considered by the President for exercise of his veto power. We would certainly advise you to recommend a veto of any such bill, and we assume that OMB, long a partner with this Office in trying to protect the constitutional prerogatives of the institutional Presidency, would concur in such a recommendation.

We believe that the best way to address the situation presented here is to send to Chairman Roth a letter expressing our strong opposition to subsection (g) and stating that this Department will recommend a veto of this bill should it be presented to the President with subsection (g) in it. As you are aware, subsection (g) in not an integral part of this particular bill, and we are in any event unaware of any pressing reason why this bill requires enactment at this time.

We would add as a final observation that, were subsection (g) to be enacted, we would not regard it to be facially unconstitutional because the limitations it places are directed only to the Director of OMB and his Office. Thus, there is no doubt that the provision could be rendered a nullity by the issuance of an executive order amending Executive Order 12291 so as to assign all functions under that order, presently assigned to OMB, to another official in another office. Indeed, we might be constrained in those circumstances to make such a recommendation to the President. That "solution" would not, however, be a very desirable one because Congress

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

APR 10 1984

MEMORANDUM FOR ROBERT A. McCONNELL
Assistant Attorney General
Office of Legislative Affairs

Re: S. 2433: The Paperwork Reduction Act Amendments of 1984.

Attached, prepared for your signature, is a letter to Senator Roth, responding to his letter to the Attorney General dated March 23, 1984 requesting this Department's views on the above bill.

As you will recall, Mr. Christopher DeMuth, Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, testified in favor of this bill before we had an opportunity to review and comment upon his testimony. The attached letter is therefore drafted to address directly to the Committee our concern regarding the bill's public disclosure requirement for deliberative materials relative to the rulemaking process.

This letter expresses the Department of Justice views. Mr. DeMuth apparently expressed either the views of the Office of Information and Regulatory Affairs or the Office of Management and Budget. We take the position that the views of the "Administration" could not yet be expressed because there has been no Administration process to develop them. Thus, until there is an Administration position and since Mr. DeMuth has already expressed his views, we believe that Chairman Roth is entitled to have the Department of Justice position.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Attachment

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your letter dated March 23, 1984 to the Attorney General requesting the views of this Department on S. 2433: The Paperwork Reduction Act Amendments of 1984.

As you are aware, Mr. Christopher DeMuth, Administrator, Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget, testified on April 4, 1984 concerning this bill before the Subcommittee on Information Management and Regulatory Affairs. The Department of Justice did not have an opportunity to review and comment upon Mr. DeMuth's testimony according to the usual procedures in advance of the submission of his testimony to the Subcommittee. We therefore appreciate this opportunity to provide you with our views concerning this legislation.

The Department of Justice has a very serious concern regarding S. 2433. Unless the bill is modified to address this concern, we will feel compelled to recommend a presidential veto.

Section 8 of the bill would amend 44 U.S.C. § 3518 by adding a new subsection (g) which would require the Director of OMB to make available to the public "any written material pertaining" to a rule or regulation submitted to OIRA by a rulemaking agency. While the intended scope of this unprecedented requirement is not entirely clear to us, we understand that it would purport to require the disclosure of any and all deliberative, policy-oriented and draft documents transmitted between OIRA and a rulemaking agency during the course of any OIRA review of a proposed or final rule or regulation. By clear implication, all documents relating to the OIRA review process under Executive Order 12291 would be subject to this disclosure requirement.

This provision represents a very serious, improper and unnecessary intrusion into the deliberative processes of the Executive Branch. For many years, and throughout numerous Administrations, the Executive Branch has resisted routine disclosure of predecisional, deliberative, policy-oriented communications transmitted between rulemaking agencies and the Executive Office of the President in the context of informal rulemaking. More than fifty years ago the Supreme Court declared in Myers v. United States, 272 U.S. 52, 135 (1926), that the President, as head of the Executive Branch, has a constitutional duty to "supervise and guide" Executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Routine public disclosure of all intra-Executive Branch communications transmitted during the deliberative process by which the Executive achieves a "unitary and uniform" execution of the laws would seriously hamper this process and restrict the President's constitutional power and duty under Article II, § 3 to "take Care that the Laws be faithfully executed."

Congress has heretofore wisely refrained from attempting to impose blanket disclosure requirements upon any of the three branches of our Government with respect to their internal, pre-decisional, deliberative communications. Each of the three branches of Government on occasion finds it necessary to preserve some measure of confidentiality for such communications. Thus, the deliberative documents of Supreme Court Justices and all other federal judges, as well as oral communications among themselves and with their staffs in the course of reaching decisions, have always been treated as confidential. Similarly, oral and written communications among Senators and Congressman and their staffs are not subject to mandatory public disclosure. I think you will agree that this measure of confidentiality is vital to assure the continued full and frank expression and exchange of ideas that is so essential to sound decisionmaking in the Judicial and Legislative Branches. Similar considerations apply in the context of predecisional, policy-oriented deliberations involving the Executive Office of the President and other Executive Branch policymakers. It is for this reason, among others, that internal deliberative memoranda of the Executive Branch are exempt from disclosure under the Freedom of Information Act.

The Supreme Court has emphasized the importance of maintaining confidentiality in the particular context of deliberations involving the President and his staff. In

United States v. Nixon, 418 U.S. 683, 705 (1974), the Supreme Court unanimously recognized

> the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

The United States Court of Appeals for the District of Columbia Circuit has expressly recognized the importance of presidential involvement in the informal rulemaking process:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared -- it rests exclusively with the President.

Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981). The court went on to explain both the constitutional foundations of the President's role in rulemaking and the desirability of maintaining that role:

> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems.

. . . .

> An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

Id. at 406.

The Sierra Club court concluded that public disclosure of communications between the President and his staff and other Executive Branch officers during an informal rulemaking proceeding was not required under the statutory procedures applicable in that case (the Clean Air Act) or under the Constitution.

The disclosure provision in S. 2433 also directly conflicts with the views of the Administrative Conference of the United States (ACUS) which, after careful study, formally promulgated a recommendation for handling public disclosure of intra-Executive Branch communications. The ACUS recommendation unequivocally rejects the idea of mandatory disclosure of policy-oriented communications between the Executive Office of the President and a rulemaking agency:

> 1. Any Executive department or agency engaged in informal rulemaking in accordance with the procedural requirements of section 553 of the Administrative Procedure Act should be free to receive written or oral policy advice and recommendations at any time from the President, advisers to the President, the Executive Office of the President, and other administrative bodies, without having a duty to place these intragovernmental communications in the public file of the rulemaking proceeding except to the extent called for in paragraph 2.
>
> 2. When the rulemaking agency receives communications from the President, advisers to the President, the Executive Office of the President, the Executive Office of the President, or other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule, the agency should promptly place copies of the documents, or summaries of any oral communications, in the public file of the rulemaking proceeding. All communications from these sources containing or reflecting comments by persons outside the government should be so identified and placed

in the public file, regardless of their content. A rulemaking agency should consider the importance of giving public participants adequate opportunity to respond if the material presents new and important issues or creates serious conflicts of data.

ACUS Recommendation No. 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.80-6 (1984)(emphasis added).

These judicial decisions, the ACUS's recommendation, and the serious constitutional and policy considerations we have outlined, all demonstrate that the disclosure provision in S. 2433 represents an improper and dangerous intrusion into this settled area of administrative law.

Moreover, there simply is no need for this kind of blanket disclosure requirement at the initial stages of the rulemaking process. As you know, under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., the rulemaking process is already highly public. The Act requires that agencies publish their proposed rules in the Federal Register and "give interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c). This submitted material must be considered by the rulemaking agency and is publicly available. In addition, the Freedom of Information Act, 5 U.S.C. § 552, requires that all information not specifically exempted from disclosure under section 552(b) be made available to the public. Against this background of broad public disclosure, there is no justification for yet another requirement to publicize preliminary, intra-Executive Branch discussions leading to proposals that will be made available for public comment. Unless members of the Executive Branch can engage in frank and open discussions of policy alternatives prior to public airing of proposed rules, the quality and thoughtfulness of the deliberative process will surely suffer.

For these reasons, we strongly urge that the proposed new subsection (g) contained in section 8 of S. 2433 be eliminated.

Sincerely,

Robert A. McConnell
Assistant Attorney General

U.S. Department of Justice

Office of Legislative Affairs

RAM:JEP:YB;rb
H.R. 3987

Office of the Assistant Attorney General

Washington, D.C. 20530

TO BUDGET FOR CLEARANCE

3 APR 1984

NOT SENT TO CONGRESS

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This presents the views of the Department of Justice on H.R. 3987, a bill "To improve the preservation and management of federal records and for other purposes." The Department of Justice opposes the enactment of this legislation.

H.R. 3987 would establish an independent entity, the National Archives and Record Administration under the supervision and direction of the Archivist of the United States, a Presidential appointee. The bill would provide the National Archives with greater powers and functions than those presently retained under the General Services Administration, (GSA) the agency currently responsible for its management and administration. H.R. 3987 would also amend various statutes pertaining to the Archives, in order to conform with the proposed establishment of the Archives Administration.

We are concerned about certain proposed amendments to 44 U.S.C. §§2905 and 3106 of the Federal Records Act, which would expand the enforcement authority of the Archivist and would provide for the Archivist independently to initiate suit for the retrieval of documents that have been wrongfully removed from the custody of a federal agency, and a proposed amendment to 44 U.S.C. §§3301 of the Records Disposal Act, which would provide for the inspection of agency records by the Archivist to determine whether records are subject to the records retention requirements of the Records Disposal Act. Although we perceive no direct conflict with the Freedom of Information Act, 5 U.S.C. §§552, we oppose both enactment of §203 of the bill, which would amend 44 U.S.C. §§2905 and 3106, and §204 of the bill, which would amend 44 U.S.C. §§3301.

We believe that the existing statutes governing records retention and management provide adequate administrative remedies, pursuant to 44 U.S.C. §§2905 and 3106, for violations of the Federal Records Act, and that the unprecedented establishment of the Archivist's right to designate attorneys, under proposed §203, to represent the Archivist in a retrieval action would be unnecessary

cc: JMD, Lands, Civil, Tax

and unwarranted. Under existing law, when an agency determines that records have been improperly removed from its custody, the agency head, the Administrator of GSA and the Attorney General must make a determination whether to initiate suit to retrieve the documents. See 44 U.S.C. §§2905 and 3106.

The Department is concerned that the proposed amendments would undermine this discretionary exercise of authority by the Attorney General on whether to initiate a lawsuit to retrieve wrongfully removed documents. Further, the amendments would clearly undercut the agency's own determination on whether a retrieval action for documents wrongfully removed from its custody would be justified in a particular instance. In this regard, the bill's reference to 28 U.S.C. §518 as purported authority for such litigation seems curious, to say the least, inasmuch as that statute speaks to the primacy of the Attorney General's litigation authority.

The Archivist should not be given litigation authority. Centralization of litigation authority in the Attorney General was first established in 1870 when the Department of Justice was created. Congress has identified the legal officers who are to protect the rights of the government under the records management and disposal laws codified at chapters 21, 29, 31 and 33 of Title 44 of the United States Code, i.e., the Attorney General and the Department of Justice. Sutherland v. International Insurance Co., 43 F.2d 969 (2d Cir.), cert. denied, 282 U.S. 890 (1930). Such centralization furthers the important policy goals of ensuring that the government speaks with one voice, ensures consideration of the potential impact of litigation upon the government as a whole, and facilitates presidential supervision over Executive Branch policies implicated in litigation. Section 203 seriously impairs these goals.

The Department has serious reservations about §204 of the bill, which would amend 44 U.S.C. §3301, pertaining to the determination of whether a record is subject to the stringent records retention requirements of the Records Disposal Act, 44 U.S.C. §3301, et seq. Essentially, the proposed provision would permit the Archivist to overrule determinations made by an agency head on whether an agency record comes within the purview of the Act. We fear that such a procedure could result in inaccurate determinations on whether documents are subject to the statute. The agency is much more qualified and able to assess the nature of the documents within its custody than the Archivist. We believe that each agency should make its own determinations, based on its expertise and familiarity with

documents within its custody or possession and under general government-wide guidelines governing such decisions, as to whether its documents are subject to the requirements of the Disposal Act. Under existing law, there are adequate statutory provisions and departmental regulations issued thereunder to achieve the purposes of that Act.

It should be noted that section 204 of H.R. 3987 appears to neutralize 44 U.S.C. §2906(2). Specifically, 44 U.S.C. §2906(2) provides that "Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by the Administration, subject to the approval of the head of the agency concerned or of the President." The proposed amendment to 44 U.S.C. §3301 would be in conflict with 44 U.S.C. §2906 and would appear to eliminate the discretionary authority of the agency head or the President to limit access to certain records and would directly conflict with Executive Order 12065, "National Security Information" and Executive Order 12356 (effective date August 1, 1982), regarding access to classified National Security Information. Finally, recent experience has shown that National Archives employees often do not have current full-field investigations or appropriate security clearances necessary to gain access to the various levels of National Security Information or Sensitive Compartmental Information. To permit unrestricted access to sensitive and/or Classified National Security Information could compromise ongoing investigations, reveal the identities of informants, endanger the lives and safety of Department employees and seriously impede the mission of the Department of Justice and possibly endanger national security.

Section 201 and section 102 of H.R. 3987 would broaden the responsibilities and authority of the Archivist beyond those currently held by the Administrator of the GSA. These proposals would, at the minimum, confuse the question as to whether the Archivist can have access to records of the Federal Bureau of Investigation over the objection or without the approval of the Director. The Department is concerned that such language might give Archivist personnel unrestricted access to classified information, informant files, information relating to pending investigations, Foreign Intelligence Surveillance Act records, Title III information, Federal grand jury matters, or tax information provided to the FBI pursuant to 26 U.S.C. §6103.

Additionally, section 102 authorizes the general promulgation of regulations by the National Archives and Record Service (NARS). This section provides that each agency must adopt such orders and

directives as necessary to conform its activities to the NARS regulations. These provisions would make agencies completely subject to the authority of NARS and would make the Archivist the sole arbiter of any conflict between NARS and an agency. We find this provision to be particularly troublesome.

The Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

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

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February 27, 1984

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LEGISLATIVE REFERRAL MEMORANDUM

Legislative Liaison Officer

TO: Deparment of Justice
Department of Defense
United States Information Agency
Central Intelligence Agency
National Security Council

SUBJECT: General Services Administration testimony on H.R. 4620, the "Federal Telecommunications Privacy Act."

(USIA and NSA testimony will be circulated as soon as it is received.)

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 OMB Circular A-19.

Please provide us with your views no later than 10:00 a.m., Wednesday, February 29, 1984.

Direct your questions to me at (395-4870).

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Adrian Curtis
Frank Reeder
Jim Jordan
Fred Fielding
Mike Uhlmann
Arnie Donahue

NSC# 8401667

DRAFT

STATEMENT OF

FRANK J. CARR

ASSISTANT ADMINISTRATOR, OFFICE OF

INFORMATION RESOURCES MANAGEMENT

GENERAL SERVICES ADMINISTRATION

BEFORE THE

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

MARCH 1, 1984

Mr. Chairman and members of the Subcommittee, I wish to express my appreciation for the opportunity to testify today on the H.R. 4620, a bill to prohibit the recording of conversations made by Government employees for official business on the Federal Telecommunications System (FTS) and any other telephone system.

The FTS is under the overall direction and management of the General Services Administration (GSA). Within GSA, these responsibilities and authorities have been delegated to the Office of Information Resources Management (OIRM). The FTS includes both the intercity voice network and the consolidated local telephone service and is the primary and recommended system for use by Federal employees in the conduct of Federal government business.

Except for very limited exceptions, listening-in or recording conversations on the FTS is prohibited by GSA regulation (41 CFR

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101-37.311). The regulations permit nonconsensual monitoring of of telephone conversations only when authorized and handled in accordance with requirements of the Omnibus Crime Control and Safe Streets Act of 1968 and the Foreign Intelligence Surveillance Act of 1978. In regard to listening-in or recording of conversation in cases where one party has consented to the interception, exceptions to the general prohibition include, in addition to interceptions for law enforcement and counter-intelligence purposes, monitoring (1) for public safety purposes, (2) to allow a handicapped employee to perform official duties, (3) to monitor the quality of agency service, or (4) with the consent of both parties. Each of the exceptions contains limitation to insure that monitoring is allowed only when absolutely necessary.

H.R. 4620 would amend the Federal Property and Administrative Services Act of 1949 (Federal Property Act) by adding a new section covering the recording or listening-in upon telephone conversations. The bill embodies to a large extent GSA's present regulations discussed above. H.R. 4620 would also make all recordings or transcripts of telephone conversations a within a "system of records" under the Privacy Act and apply the criminal penalties set forth in 18 U.S.C. 2071 to the removal or destruction of such recordings or transcripts.

We certainly cannot criticize the purpose ~~or the wording~~ of the portions of H.R. 4620 which were taken from the GSA regulation.

We are concerned, however, that placing this language in a statute may hinder, rather than help, our efforts to reduce abuses in the monitoring of telephone conversations. If present regulations are locked into statute, we will lose needed flexibility. Regulations can be easily modified to meet new circumstances. This is especially important in the area of telecommunications with its rapidly developing technology. Provisions in statute are not nearly as adaptable. The legislative process does not lend itself to quick action, even in cases where there is consensus on the need for change. GSA would be able to deal more effectively with the problems of listening-in or recording conversations if the prohibitions would remain in regulations alone.

GSA does support the provisions of H.R. 4620 which clarify the status of recordings or transcripts of telephone conversations as "records." By making these recordings and transcripts "records in a system of records" under the Privacy Act, the bill would guarantee that each party to a conversation would have access to the recorded or transcribed conversations in which he or she was a participant. Furthermore, the recording or transcripts could be used and disclosed only for the limited purposes described in the Privacy Act. Agencies would also be required to publish a notice in the Federal Register when a system of records dealing with recordings or transcriptions of telephone conversations is established or revised. Most important, we note that the Privacy Act contains "teeth" to enforce its provisions in the form of

DRAFT

criminal penalties for violations of the Act. We believe that these enforcement provisions, along with the criminal penalties imposed by 18 U.S.C. 2071 for the removal and destruction of records, would serve to focus attention on all the restrictions on monitoring telephone conversation, including the GSA regulations.

This concludes my prepared statement, Mr. Chairman. I would be glad to respond to questions you or other members of the Subcommittee may have.

NSC/S PROFILE UNCLASSIFIED ID 8401667

RECEIVED 28 FEB 84 17

TO KIMMITT FROM MURR, J DOCDATE 27 FEB 84

URGENT

KEYWORDS: TELECOMMUNICATIONS LEGISLATIVE REFERRAL

SUBJECT: GSA TESTIMONY ON HR-4620 RE FEDERAL TELECOMMUNICATIONS PRIVACY ACT

ACTION: PREPARE MEMO KIMMITT TO MURR DUE: 29 FEB 84 STATUS S FILES

FOR ACTION	FOR CONCURRENCE		FOR INFO
HELM	DEGRAFFENREID	RYE	RAYMOND
	LEHMAN, C	REGER	THOMPSON
			SABLE

Due to deadline, Helm phoned concurrence. No further action required. Close file

COMMENTS PACKAGE IS DUE BY 10:00 AM 29 FEB

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C	2/29	No further Action Required (Handled by Phone)		

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Name of Correspondent: James Muck

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Subject: Statement of Robert Rich concerning H.R. 4620, The Federal Telecommunications Privacy Act of 1984 on March 1, 1984

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOU	ORIGINATOR	84 02 28 JV		C	84 02 29 JV
CUAT 17	Referral Note: D	84 02 28 JV		C	84 02 29 JV
CUFIEL	Referral Note: S	84 02 29 JV	~~FF~~	~~A~~	~~84 02 29~~
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THE WHITE HOUSE

WASHINGTON

February 29, 1984

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR LEGISLATIVE REFERENCE
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: National Security Agency
Testimony on H.R. 4620

We have reviewed the above-referenced testimony and have no legal or other objections to it.

FFF:SMC:ph 2/29/84
cc: FFFielding
SMCooksey
Subject
Chron.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 29, 1984

OBE; Ltr sent — 3/1

FOR: FRED F. FIELDING

FROM: SHERRIE M. COOKSEY SMC

SUBJECT: National Security Agency
Testimony on H.R. 4620

OMB has requested our views by noon today on the testimony of the National Security Agency on H.R. 4620, the "Federal Telecommunications Privacy Act of 1984."

The proposed testimony will be presented to the House Government Operations Subcommittee on Legislation and National Security on Thursday, March 1. In that testimony, NSA describes the effects of H.R. 4620 on its two principal missions, signals intelligence and communications security, and recommends modifications in H.R. 4620 to alleviate those effects. NSA notes that part of its signal intelligence mission is regulated and mandated by Executive Order 12333 and its guidelines; however, H.R. 4620 makes no provision for these activities. Additionally, the communications security mission of NSA includes systematic monitoring of NSA-related telecommunications to determine the adequacy of the security of those communications. This monitoring is conducted pursuant to detailed guidelines issued by the Attorney General; however, there is no provision in H.R. 4620 for these activities. In a letter accompanying the proposed NSA testimony, the Director of NSA makes specific recommendations for amendment of H.R. 4620 to address the concerns noted above and several other concerns.

I have no legal or substantive objections to these proposals. NSA is merely requesting the Congress to provide for the continuation of certain of its activities that have been omitted by this bill.

Attached for your review and signature is a memorandum for Jim Murr stating that we have no legal or other objections to this proposed testimony.

Attachment

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

SPECIAL

February 28, 1984

LEGISLATIVE REFERRAL MEMORANDUM

Legislative Liaison Officer

TO: Department of Justice
United States Information Agency
General Services Administration
Central Intelligence Agency
National Security Council

SUBJECT: National Security Agency testimony on H.R. 4620, the "Federal Telecommunications Privacy Act."

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 OMB Circular A-19.

Please provide us with your views no later than 12:00 Noon, Wednesday, February 29, 1984.

Direct your questions to me at (395-4870).

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Adrian Curtis
Frank Reeder
Jim Jordan
Fred Fielding
Mike Uhlmann
Arnie Donahue

1984 FEB 28 PM 6:16

H.R. 4620, 98th Congress

STATEMENT

OF

ROBERT E. RICH
DEPUTY DIRECTOR
NATIONAL SECURITY AGENCY

BEFORE

THE

COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY
HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 4620
THE FEDERAL TELECOMMUNICATIONS PRIVACY ACT OF 1984

ON

MARCH 1, 1984

Mr. Chairman:

I am the Deputy Director of the National Security Agency (NSA). With me today is the General Counsel of the National Security Agency, Mr. Jon T. Anderson. We are glad to have the opportunity this morning to express our views on H.R. 4620 on behalf of the Agency.

Before discussing the bill, I wish to make a few comments which will place our concerns in perspective. The National Security Agency's principal missions, signals intelligence and communications security, necessarily involve the monitoring and recording of communications. Signals intelligence (SIGINT) is directed at foreign communications to produce foreign intelligence and would only infrequently be affected by the bill.

The communications security mission focuses on United States Government telecommunications and would be generally affected by H.R. 4620. In addition, the Agency has administrative requirements to record communications, for example our command and security centers must record certain communications. Such monitoring and recording as now occurs is extensively regulated by statutes, executive order, or Department of Defense procedures. Regulation in this area has evolved over many years, and we believe it effectively protects the rights of Americans while permitting the accomplishment of vital national security functions. The prospect of additional regulation for these essential activities is a daunting one,

particularly so when the ostensible target of H.R. 4620 is a type of recording which is flatly prohibited within the Department of Defense unless all parties are informed of and consent to the recording. Our comments on the bill are designed to alert the Committee to consequences for NSA which we assume are unintended and to suggest solutions which would enable us to perform our missions under the existing regulatory framework.

Before proceeding, I must advise the Committee that a more detailed elaboration of the points made in this testimony could involve classified information. I will do my best to be responsive in this forum but ask the Committee's indulgence if a classified response would be required.

Subsection (a) of the new section that would be added to the Federal Property and Administrative Services Act of 1949 would prohibit federal officers and employees from recording or listening-in upon any conversation conducted on a federal telecommunications system or conducted on any other telecommunications system if the conversation is between a federal officer or employee and any other person and involves the conduct of Government business.

Subsection (b) permits--that is, exempts from the prohibition in subsection (a)--the recording of, or listening-in upon, a conversation without the consent of any party to it when the

recording or listening-in is authorized under the Omnibus Crime Control and Safe Streets Act of 1968 or the Foreign Intelligence Surveillance Act.

Subsection (c) permits the recording of or listening-in upon a conversation with consent of one party to it when the recording or listening-in is performed (1) for law enforcement purposes, (2) for counterintelligence purposes, (3) for public safety purposes, (4) by a handicapped employee as a tool necessary to his or her performance of official duties, or (5) for service monitoring purposes.

Subsection (d) permits the recording of or listening-in upon a conversation with the consent of all parties to it conducted in cases of telephone conferences, secretarial recording, and other acceptable administrative practices under strict supervisory controls to eliminate possible abuses.

Two principal missions of the Agency are affected by this bill--the signals intelligence (SIGINT) mission and the communications security (COMSEC) mission. Included in the SIGINT mission is the interception and processing of foreign communications to produce intelligence information for the President, his cabinet members, and other national policymakers. All but a very small part of the SIGINT mission is outside the scope of this bill because the communications systems that are monitored are other

than those defined in subsection (a) of this bill, and only in very rare instances is it even possible that one of the communicants could be an officer or employee referred to in subsection (a). A part of NSA's SIGINT mission that could involve systems and persons within the scope of this bill is conducted under the Foreign Intelligence Surveillance Act in accordance with court orders or guidelines mandated by the Act, and is, therefore, exempt under subsection (b) from the Act's prohibition. The exemption in subsection (b) is clearly a necessary and reasonable one. We applaud your foresight in including it. However other parts of our SIGINT mission are conducted against communications outside the scope of FISA; that part of our SIGINT mission is regulated by guidelines mandated by E. O. 12333, and consistent with guidelines in effect since 1976. The bill makes no provision for those activities. Consequently, the exempting provisions need to be augmented in ways which we described in our Director's letter of February 28, 1984, a copy of which is attached.

The second of the Agency's primary missions that would be affected by your proposed statute is communications security (COMSEC). COMSEC means protective measures taken to deny unauthorized persons information derived from telecommunications of the U. S. Government, including certain contractors of the Government, related to national security and to ensure the authenticity of such communications. Such protection results from the application of security measures (including cryptographic

security, transmission security, emissions security) to electrical systems generating, handling, processing, or using national security or national security related information. It also includes the application of physical security measures to COMSEC information or materials. Systematic examinations of telecommunications are carried out to determine the adequacy of COMSEC measures, to identify COMSEC deficiencies, to provide data from which to predict the effectiveness of proposed COMSEC measures, and to confirm the adequacy of such measures after implementation. COMSEC monitoring is an essential part of such examinations and is conducted pursuant to detailed guidelines approved by the Attorney General. COMSEC monitoring is the act of listening to, copying, or recording transmissions of Executive Branch official telecommunications, including the communications of certain contractors, to provide technical material for analysis in order to determine the degree of cryptographic or transmission security being provided to these transmissions. This monitoring is only infrequently conducted and notice is required to be provided to persons utilizing communications systems subject to such monitoring. COMSEC monitoring must be exempted from the prohibitions in the bill. None of the exemptions included in H.R. 4620 as introduced covers COMSEC monitoring. The Director, NSA's letter previously mentioned indicates the form we believe an exemption should take so as to permit the continuation of this important activity.

As my statement indicates, NSA's concerns about H.R. 4620 relate to the ways in which Agency functions would be adversely affected that, we believe, are not intended by the bill's drafter. Those concerns are the highly technical areas that are described in the attached letter, with some specific suggestions for required amendments to H.R. 4620. We would of course be glad to aid however we can in ascertaining precise text of changes. Meanwhile, we will be pleased to respond to any questions that you have at this time.

Attachment

a/s

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

Serial: N0323
28 February 1984

The Honorable Jack Brooks
Chairman, Committee on Government Operations
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This is in response to your letter of February 6, 1984, requesting a report and comments on H.R. 4620, the "Federal Telecommunications Privacy Act of 1984," and your letter of February 15, 1984, requesting my appearance before hearings on H.R. 4620 to be held on March 1, 1984, by the Subcommittee on Legislation and National Security of your Committee. I regret that I am unable to attend the hearing on H.R. 4620. Previously scheduled hearings are being held by the Permanent Select Committee on Intelligence on March 1, 1984, on the fiscal year 1985 budget, and my presence is required there by that Committee during both morning and afternoon sessions. I hope that the appearance in my stead at the hearing on H.R. 4620 of Mr. Robert E. Rich, Deputy Director, National Security Agency, will be satisfactory.

Summary of the Bill

H.R. 4620 would prohibit federal officers and employees from recording or listening-in upon any conversation conducted on a federal telecommunications system or conducted on any other telecommunications system if the conversation is between a federal officer or employee and any other person and involves the conduct of Government business.

Exempted under subsection (b) would be the recording of, or listening-in upon, a conversation without the consent of any party to it when the recording or listening is authorized under the Omnibus Crime Control and Safe Streets Act of 1968 or the Foreign Intelligence Surveillance Act.

Exempted under subsection (c) would be the recording of, or listening-in upon, a conversation with the consent of one party to it when the recording or listening-in is performed (1) for law enforcement purposes, (2) for counterintelligence purposes, (3) for public safety purposes, (4) by a handicapped employee as a tool necessary to his or her performance of official duties, or (5) for service monitoring purposes.

Recording of or listening-in upon telephone conversations pursuant to subsection (c)(3), (4), and (5) must have prior approval by the agency head or designee of written determinations specifying the operational need for listening-in or recording

conversations, the system and location where it is to be performed, the telephone numbers and recorders involved, and operating times and the expiration date and justifying the use. Service monitoring under subsection(c)(5) could be conducted only by designated personnel after positive action to inform callers of the monitoring and labeling of telephone instruments subject to the monitoring. Only the minimum number of calls necessary to compare a statistically valid sample could be monitored. No data identifying the caller could be recorded by the monitoring party, and no information obtained by the monitoring could be used against the calling party.

Under subsection (d) recording of or listening-in upon a telephone conversation with the consent of all parties to it could be conducted in cases of telephone conferences, secretarial recording, and other acceptable administrative practices under strict supervisory controls to eliminate possible abuses.

Current copies and subsequent changes of agency documentation, determinations, policies, and procedures supporting operations pursuant to subsections (c)(3), (4), or (5) would be required to be forwarded before the operational date for the General Services Administration (GSA). The GSA would be accountable for information concerning operations under subsection (c)(3), (4), and (5), and for periodically reviewing listening-in programs with agencies to ensure compliance with federal property management regulations. The GSA would be charged with obtaining compliance with the enacted H.R. 4620 if an agency failed to document its devices in accordance with the Act.

Subsection (g) provides that any recording or transcription of a conversation made under (or in violation of) the Act would be a record within a system of records under the Privacy Act of 1974 as to each party to the conversation. Subsection (h) would include any such recording or transcription within the protection of a criminal statute prohibiting the concealment, removal, mutilation, obliteration, falsification, or destruction of records filed with officials of U. S. courts or other public office.

Effects on NSA

Set forth below are the effects that this bill would have on the activities of the National Security Agency (NSA). In reviewing these effects, you should keep in mind two key points. First, the bill proposes to legislate in an exceedingly complex area, i.e., electronic surveillance. H.R. 4620 would be at least the fourth statute that affects monitoring of telecommunications (see also 18 U.S.C. §§2510 et seq., 47 U.S.C. §605, and 50 U.S.C. §1801 et seq.). The three existing statutes are not well integrated with each other, and against this background H.R. 4620 inevitably adds complexity. Without more time to consult with

all interested parties in the Executive Branch, I cannot be certain that the full impact of H.R. 4620 on NSA is yet recognized. Thus, this Agency may be required to supplement these comments. Second, while the scope of H.R. 4620 as regards the activities of NSA is potentially quite broad, the actual incidence of some effects may be very infrequent. For example, in the conduct of its SIGINT mission NSA rarely, if ever, overhears the telecommunication of a federal employee discussing Government business. Nevertheless, it is a possibility and could occur accidentally in the course of an overseas surveillance which is not conducted under the Foreign Intelligence Surveillance Act.

Two primary missions of the National Security Agency (NSA) would be affected by your proposed statute. Significant aspects of the Agency's signals intelligence (SIGINT) mission are governed by the Foreign Intelligence Surveillance Act of 1978 (FISA). By virtue of subsection (b), that mission would be unaffected by the Act, unless recordings made under FISA authority would be deemed to be "made under...this Act" and therefore deemed records in a system of records for Privacy Act purposes and records for purposes of the criminal statute cited in subsection (h).

Automatically declaring a SIGINT recording as a Privacy Act record regardless of how the recording is maintained and retrieved would be inappropriate for several reasons. First, statutory minimization procedures require deletion of personal identifiers in many cases. Second, it would be impossible to comply with Privacy Act requirements without creating an index--a process that would be very costly and counterproductive to privacy concerns. Finally, disclosure of the fact alone that a telephone conversation of a particular person had been intercepted and processed for SIGINT purposes by NSA could jeopardize SIGINT sources and methods and would be a fact that the Agency could neither confirm nor deny. The adverse consequences of declaring all recordings made under (or in violation of) this Act to be Privacy Act records also apply, in varying degrees, to the other Agency functions discussed in this letter.

NSA conducts a number of SIGINT activities at the request of federal officials directed against their communications for counterterrorism purposes. Since counterintelligence is not defined, it appears necessary to amend (c)(2) by adding "or counterterrorism" in line 11, page 3, after counterintelligence.

NSA also conducts other SIGINT activities that either intentionally or accidentally could monitor or record communications within the scope of Section 113(a)(2). For example, the Agency or its associated military components may monitor U.S. military exercise communications. Because of the nature of exercises, it is rarely possible to secure consent of any party, let alone all parties to a communication. As mentioned previously,

it is also possible that in the course of SIGINT activities conducted outside the scope of FISA incidental overhears are possible. Finally, NSA, or other intelligence agencies, could be authorized by the Attorney General pursuant to E.O. 12333 to conduct electronic surveillance of a federal employee abroad, i.e., outside the scope of FISA. Such a surveillance could acquire communications within the scope of Section 113(a)(2). These problems could be avoided by adding a new subparagraph to Section 113(b):

> "(3) Without the consent of any party to a conversation, the recording of, or listening-in upon, such conversation may be conducted notwithstanding subsection (a) if such recording or listening is conducted against communications outside the scope of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et seq.) or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), is conducted by an agency in the Intelligence Community, and is conducted pursuant to guidelines approved by the Attorney General."

The second of the Agency's primary missions that would be affected by your proposed statute is communications security (COMSEC). COMSEC means protective measures taken to deny unauthorized persons information derived from telecommunications of the U. S. Government, including certain contractors of the Government, related to national security and to ensure the authenticity of such communications. Such protection results from the application of security measures (including crypto security, transmission security, emissions security) to electrical systems generating, handling, processing, or using national security or national security related information. It also includes the application of physical security measures to COMSEC information or materials. Systematic examinations of telecommunications are carried out to determine the adequacy of COMSEC measures, to identify COMSEC deficiencies, to provide data from which to predict the effectiveness of proposed COMSEC measures, and to confirm the adequacy of such measures after implementation. COMSEC monitoring is an essential part of such examinations, and is conducted pursuant to detailed guidelines approved by the Attorney General. COMSEC monitoring is the act of listening to, copying, or recording transmissions of Executive Branch official telecommunications, including the communications of certain contractors, to provide technical material for analysis in order to determine the degree of cryptographic or transmission security being provided to these transmissions. This monitoring is only infrequently conducted and notice is required to be provided to persons utilizing communications systems subject to such monitoring. COMSEC monitoring must be exempted from the prohibitions in your bill. None of the exemptions included in H.R. 4620 as introduced covers COMSEC monitoring. I propose that the following paragraph be added under subsection (c):

"(6) The recording or listening-in is performed by or under the authorization of the Executive Agent for Communications Security for the purpose of communications security (COMSEC) monitoring to obtain material for analysis in order to determine the adequacy of COMSEC measures, to identify COMSEC deficiencies, to provide data from which to predict the effectiveness of proposed COMSEC measures, and to confirm the adequacy of such measures after implementation. Such monitoring shall be conducted pursuant to guidelines approved by the Attorney General."

NSA is also authorized to monitor and record communications to train its personnel and to test its equipment. To protect private citizens from such activities a preferred target for such monitoring is Government telecommunications. While existing procedures also state a preference for consensual monitoring, it is rarely possible to assure that all parties to these communications consent. While the FISA authorizes monitoring for these purposes the scope of FISA is much narrower than the scope of H.R. 4620. FISA only affects monitoring which constitutes electronic surveillance as defined in 50 U.S.C. 1801(f)(1)-(4), i.e., in general terms, electronic surveillance in the United States. H.R. 4620 would also affect monitoring which occurred abroad. To avoid the unintended impact of the unequal scope of these statutes, I propose the following paragraph be added under subsection (b) after inserting "(1)" after "(b)":

"(2) Without the consent of any party to a conversation the recording or listening-in may be performed notwithstanding subsection (a) by a federal agency to train personnel in the use of electronic surveillance equipment or to test the capability of electronic equipment. The Attorney General shall approve procedures for such recording or listening-in consistent with the criteria and limitations of 50 U.S.C. 1805(f)(1) and (3)."

Recording or listening-in is performed by NSA employees for public safety and service monitoring purposes on telecommunications systems used at NSA to support SIGINT and COMSEC operations. The recordings resulting from such monitoring often contain highly classified information or information that, even if unclassified, may be withheld from disclosure by the Agency under section 6 of the National Security Agency Act of 1959, as amended. 50 U.S.C §402 (note). Subsection (e)(2) of H.R. 4620 should be amended by adding after "subsection (c)" on line 8, page 6, the following clause:

"except such operations conducted to support the activities of the National Security Agency."

Representatives of the National Security Agency would, of course, be pleased to meet with you to discuss the concerns set forth above.

Sincerely,

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

ID # 209203 CU

JV

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Subject: Statement of Frank Carr before subcommittee on legislation and national Security Concerning General Services Administration testimony on HR 4620. the "The Federal Telecommunications Privacy Act"

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Completion Code	Completion Date YY/MM/DD
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CUAT 18	Referral Note: D	84 10 28 JV		C	84 10 29 JV
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JR - sorry - status?

THE WHITE HOUSE

WASHINGTON

February 29, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: H.R. 4620: Telephone Recording Bill

OMB has asked for our views by 10:00 a.m. today on testimony to be delivered March 1 by GSA and by Mr. Wick before the Subcommittee on Legislation and National Security of the House Government Operations Committee. The testimony concerns H.R. 4620, a bill that would elevate current GSA anti-recording regulations to the level of statute, and make recordings or transcripts of telephone conversations subject to the Privacy Act. H.R. 4620 would prohibit one-party consent recording of telephone conversations on Government telephones, or by Federal employees discussing Government business on non-government telephones, unless the recording was for Attorney General approved law enforcement or counterintelligence purposes, public safety (e.g., emergency numbers), service monitoring, or for the use of the handicapped. The bill would subject any recordings or transcripts to the Privacy Act, 5 U.S.C. § 552a, which imposes limits on use and transfer of the recordings or transcripts to other agencies, and accords those recorded a right of access to the recording. No penalties appear to be imposed for violating the anti-recording provisions themselves, although criminal penalties do exist for violating the Privacy Act, and those penalties would apply to misuse of any recordings or transcripts if H.R. 4620 were to pass.

GSA's brief testimony opposes codifying the anti-recording regulations, on the ground that dealing with the problem through regulations affords the agency more flexibility, while the statutory approach would inhibit GSA from quickly responding to new problems as they arise. GSA supports, however, making recordings and transcripts subject to the Privacy Act.

Wick's testimony is inconsistent with the GSA approach. He expresses the hope that "a codification in law" will come out of the hearings that will help others avoid his mistakes, and states that if H.R. 4620 had been in place, "I can assure you I would have been more attentive to the issue."

We have not yet received testimony from NSA, which is also scheduled to be delivered before the Subcommittee.

In light of the sensitivity of these issues, we should discuss. I can then convey comments orally to OMB.

Attachment