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

February 27, 1984

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

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

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.

THE WHITE HOUSE

WASHINGTON

March 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft NSA Answers to Questions From the House Government Operations Committee Concerning H.R. 4620 and Draft CIA, Justice and GSA Reports on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983"

OMB has asked for our views by 1:00 p.m. today on a variety of agency views on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983." This bill would essentially enact as a statute existing GSA regulations prohibiting one-party interception and recording of telephone conversations. The prohibition would apply to government telephones and discussions of government business by government employees on non-government telephones. No penalty would be imposed for violating the prohibition, but any recordings that are made would be deemed to be government records subject to the Privacy Act. Penalties under that act would accordingly attach to the destruction of tapes or transcripts, and agencies would be required to follow Privacy Act procedures governing maintenance of and access to the tapes and transcripts.

The material circulated by OMB includes draft NSA responses to questions submitted by the House Government Operations Committee. The responses generally point out the difficulties the bill would present for currently accepted intelligence gathering activities, and the burden Privacy Act coverage would impose on NSA record-keeping. The first response on page 7 dismisses a possible inconsistency in the bill by stating that "[s]ervice monitoring is performed to ascertain how well equipment is operating; it is not done to review contents of conversations." This is inaccurate; service monitoring often involves reviewing the contents of conversations, as when done to check the performance of employees manning government telephone banks. NSA should be advised to revise this answer accordingly. I hesitate to suggest an answer at this point, since the issue should be addressed by those at NSA who have studied the bill and considered its effect on the operations of their agency. We can review NSA's proposed new answer when submitted.

The CIA draft report notes that the bill would not directly affect the CIA since that agency is expressly exempt from the Federal Property and Administrative Services Act, which the bill would amend. The CIA report appropriately goes on to echo the concerns raised by NSA concerning the effect of the bill on NSA.

GSA's draft report simply recommends technical clarifications in the bill. The Justice draft report, however, vigorously opposes the legislation. Justice argues that the bill would adversely affect law enforcement, and lacks a viable exception for law enforcement activities. Justice also contends that the bill would interfere with existing communications security monitoring activites. These activities, conducted by Defense and NSA, include intercepting and recording conversations over official telecommunications systems to determine if users are protecting classified information. Finally, Justice argues that subjecting tapes and transcripts of recordings to Privacy Act coverage would impose intolerable administrative burdens.

Justice's report concludes by stating: "We believe that the nature of the activity here does not merit a federal criminal statute, but would be better addressed through administrative regulations or by an executive order that would not raise the concerns discussed above." I think we should object to the gratuitous suggestion of an executive order, and change "addressed through administrative regulations or by an executive order that" to "addressed administratively in a manner that."

Attachment

THE WHITE HOUSE

WASHINGTON

March 30, 1984

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

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft NSA Answers to Questions From the House Government Operations Committee Concerning H.R. 4620 and Draft CIA, Justice and GSA Reports on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983"

Counsel's Office has reviewed the above-referenced proposed reports on H.R. 4620. The first answer on page 7 of the draft National Security Agency responses is inaccurate and should be changed. Service monitoring is not limited to checking equipment; it includes as well monitoring the performance of government employees involved in activities such as manning telephone banks, and accordingly can involve review of the contents of conversations.

We also object to the penultimate sentence of the draft Justice report, with its suggestion that the problem might be addressed by an executive order. No decision has been reached on this and accordingly the possibility should not be gratuitously raised. We recommend changing "addressed through administrative regulations or by an executive order that" to "addressed administratively in a manner that."

FFF:JGR:aea 3/30/84
cc: FFFielding/JGRoberts/Subj/Chron

U. S. Department of Justice
Office of Legislative Affairs

DRAFT

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

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

Dear Mr. Chairman:

This letter is in response to your request for comments on H.R. 4620, a bill to prohibit the overhearing or recording of conversations on the federal telecommunications system. The Department of Justice is vigorously opposed to the enactment of this legislation. Not only might the bill's prohibitions interfere with federal law enforcement and national security efforts, its Privacy Act requirements may be excessively burdensome and may excessively intrude on government functions.

A. Background

Section 2511(2)(c) and (d) of title 18, United States Code, operates to exempt one-party consensual interceptions from the prohibitions of the Omnibus Crime Control and Safe Streets Act of 1968 (10 U.S.C. §§ 2510 et seq.) unless the interceptor (1) is not acting under color of law and (2) intercepts for a criminal, tortious, or other injurious purpose. Otherwise, there is no federal statutory law which prohibits the surreptitious, one-party consensual interception of communications.

The General Services Administration (GSA), pursuant to its authority to issue rules relating to the management and disposal of government property (41 U.S.C. § 486(c)), promulgated regulations for the use of the federal telecommunications system. 41 C.F.R. Part 101-37. A portion of the regulations prohibits, with exceptions nearly identical to those contained in H.R. 4620, one-party consensual interception of communications.

B. Proposed Legislation

H.R. 4826 would amend title I of the Federal Property and Administrative Services Act of 1949 by adding a new section 113. Subsection (a) of that new section would prohibit a federal employee from causing or permitting the recording or listening in upon any telephone conversation conducted on the federal telecommunications system. It would also prohibit a federal employee from causing or permitting the recording or listening in upon any telephone conversation between a federal employee and another person if the call "involves the conduct of Government business."

Although the phrase "federal telecommunications system" is not defined in the bill, a definition exists in 41 C.F.R. § 101-37.105-2. The Code of Federal Regulations definition "includes the intercity voice network, the consolidated local telephone service ... and other networks which are for the exclusive or common use of Federal agencies or support Government business." Consequently, a call made from or to nearly any federal telephone would seem to be within the bill's reach. In addition, the bill apparently would prohibit the one-party consensual recording of a telephone call if a federal employee spoke on his or her home telephone "involv[ing] the conduct of Government business."

Subsection(b) exempts from the prohibition found 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 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 that employee's 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.

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 1984 as to each party to the conversation. Subsection(h) makes any such recording or transcription "a record deposited in a public office" for the purposes of the prohibition against destroying government records, a prohibition carrying a

penalty of three years imprisonment and a $2,000 fine for its violation. 18 U.S.C. §2071.

C. Effect on Law Enforcement

One of the greatest problems with the bill is its potential for resulting in the suppression of valuable evidence in criminal cases. If a federal employee, in good faith, surreptitiously records a telephone conversation in which he or she is offered a bribe, but in doing so technically violates a procedure established by the agency (see section 113(c)(1)),the employee also would technically violate the provisions of the bill. Consequently, a court might suppress the recording and any derivative evidence at a subsequent bribery trial. In such case, the harmful effect of the bill's "cure" far exceeds any possible perceived "wrong."

An analysis of section 113(c)(1), the provision allowing for one-party consensual interceptions of communications for law enforcement purposes, illustrates additional problems with the scheme proposed in H.R. 4620. The exemption requires that such interceptions for law enforcement purposes be performed "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." Nothing in the 1968 Act specifically authorizes or requires the Attorney General to establish guidelines or procedures for one-party consensual monitoring and, at present, there are no such guidelines or procedures. Consequently, the bill does not provide a viable law enforcement exemption.

The Attorney General has never issued guidelines or procedures for one-party consensual interceptions under the Omnibus Crime Control and Safe Streets Act of 1968. The Attorney General has required agency heads to adopt rules concerning the consensual interception of telephone communications in former versions of his "Memorandum to the Heads and Inspectors General of Executive Departments and Agencies re: Procedures for Lawful, Warrantless Interceptions of Verbal Communications." 1/ The

---

1/ This memorandum is not issued under authority or requirement of the Omnibus Crime Control and Safe Streets Act of 1968. The sources of authority for the Memorandum are Executive Order No. 11396 ("Providing for the Coordination by the Attorney General of Federal Law Enforcement and Crime Prevention Programs"), Presidential Memorandum ("Federal Law Enforcement Coordination, Policy and Practices") of September 11, 1979, Presidential Memorandum (untitled) of

(Footnote Continued)

most recent version of that memorandum, dated November 7, 1983, does not address one-party consensual interceptions at all.

Even if the law enforcement exemption was redrafted to eliminate the reference to nonexistent guidelines and procedures, the exemption would still be troublesome. It would prove an administrative nightmare to convince each agency to adopt rules for one-party consensual interceptions and to ensure that each agency's rules were drafted so as to facilitate effective law enforcement efforts.

D. Effect on Existing Government Security Programs

While H.R. 4620 expressly exempts from its prohibitions listening in or recording for counterintelligence purposes, that exemption may prove too narrow to cover all legitimate and necessary national security activities. Of major concern is the bill's failure to provide a specific exemption for foreign intelligence activities. Such activities, distinct from counterintelligence activities, are obviously of vital importance to national security and one-party consensual monitoring presently serves as an effective and reliable technique for conducting those activities.

In addition, H.R. 4620 may interfere with the communications security monitoring program. Communications security monitoring, currently conducted primarily by the Department of Defense and the National Security Agency, involves listening to, copying, or recording communications transmitted over official telecommunications systems to determine the degree of protection being afforded to classified information by the users of those systems. This program is intended to provide insight into the nature and extent of classified information available to foreign powers that might monitor United States communications systems, and to assess the effectiveness of measures designed to protect such information from unauthorized persons. As such, communications security monitoring encompasses a broader range of activities than those included in the counterintelligence exemption. In addition, while some electronic surveillance testing, training, and audio countermeasures programs are governed by the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1081, 1805(b), not all communications security activities are covered by that Act and, therefore, would not be within the exemption set forth in section 113(b) of the bill.

(Footnote Continued)
June 30, 1965 on, inter alia, the utilization of mechanical or electronic devices to overhear non-telephone conversations, and the inherent authority of the Attorney General as the chief law enforcement officer of the United States.

United States government communications security monitoring takes place both within and outside the United States. Authority to conduct the monitoring is derived from Executive Order 12333, "United States Intelligence Activities," 3 C.F.R. 200 (1981), and the National Communications Security Directive (June 20, 1979), promulgated under Executive Order 12036. Both the Directive and Executive Order 12333 require the promulgation of communications security monitoring procedures which must be approved by the Attorney General. New communications security procedures that reflect the authorities in Executive Order 12333 were approved by the Attorney General on January 9, 1984. These procedures govern the communications security activities of the Defense Department, National Security Agency, and other agencies that may have a need for such a program.

The legality of these communications security monitoring activities is based on the fact that persons using the system have been provided with one or more of several permissible forms of explicit notice that the system is subject to communications security monitoring and that by using the system they have thereby consented to the monitoring of their communications. As to individuals who are communicating with persons utilizing a monitored system, since at least one of the parties to the communication has consented, the monitoring is lawful. See, e.g., United States v. White, 401 U.S. 745 (1971); Executive Order 12333, section 3.4(b). The communications security procedures approved by the Attorney General are designed to protect the interests of such individuals by restricting the use and dissemination that may be made of their communications.

An additional aspect of these new communications security procedures that conflicts with H.R. 4620 is authority that is provided for disseminating law enforcement information acquired incidentally during communications security monitoring. The present scheme allows information relating directly to a significant crime that is acquired incidentally during the course of an authorized communications security monitoring program to be referred to the military commander or law enforcement agency having appropriate jurisdiction, as long as it is disseminated only in accordance with additional Attorney General-approved procedures that have yet to receive approval. Once approved these procedures will identify the type of information that may be disseminated for law enforcement purposes by defining a "significant crime." There will also be a provision for prior consultation with the General Counsel of the monitoring agency to allow full consideration with the General Counsel of the potential risks before deciding whether to prosecute individuals on the basis of information acquired by communications security monitoring.

Under H.R. 4620, however, dissemination of that information would be limited under section(b)(7) of the Privacy Act to instances where the head of such enforcement agency made a written request specifying the particular portion of the record

desired and the law enforcement activity for which the record is sought. This is an obviously unworkable dissemination scheme in a context such as this one where obtaining such law enforcement information is an inadvertent consequence of an ongoing monitoring program. In such a context the head of the appropriate law enforcement agency, being ignorant of the criminal activity and its perpetrators, or at least of the fact that evidence of such activity has been obtained, will be unable to frame a section(b)(7) request to obtain that information.

In addition to standard communications security monitoring, the Defense Department conducts another type of communications security activity, termed "hearability surveys", that could be affected by the enactment of H.R. 4620. A "hearability survey" is a communications security activity in which radio communications are monitored to determine whether a particular radio signal may be intercepted by other persons or governments at one or more locations, and to determine the quality of reception over time.

Hearability surveys are also governed by Defense Department procedures that were approved by the Attorney General on October 4, 1982 under Executive Order 12333. While the content of a conversation may be overheard during the course of a hearability survey, the procedures stipulate that such contents cannot be recorded or included in any report resulting from the survey. The procedures further provide that, where practicable, the Defense Department will obtain the consent of the owner or user of a facility that will be subjected to a hearability survey prior to conducting the survey.

E. Record Retention and Penalty Provisions

Although the bill purports to prohibit one-party consensual recording or listening in to telephone conversations, the bill contains no penalty for such recording or listening in. Instead, in subsections(g) and (h), which make all recordings or transcriptions of conversations made under (or in violation) of the bill Privacy Act records, the bill penalizes something quite different -- the failure to retain, as a government record, every recording or transcript made under the Act, including interceptions made with the consent of all parties. Certainly the activity sanctioned under this bill should be the same as the major activity this bill seeks to prohibit.

In addition, the broad scope of the retention and penalty provisions of the bill may result in criminalizing behavior not only far outside that which it is the bill's purpose to prohibit, but far outside the normal bounds of the Privacy Act. For example, if a citizen calls a government employee, asks the employee whether he (the citizen) may record the call, and obtains the employee's consent, then any resulting recording would have occurred with the "permission" of the employee and may be deemed "made under the Act." Consequently, by operation of

law, the tape would become a "record in a [government] system of records for the purposes of subsection (g) of the bill, and "a record deposited in a public office" for purposes of subsection (h). The citizen's erasing of his own tape could constitute a federal felony, subsection (h) and 18 U.S.C. §2701; his disclosure to a neighbor, a misdemeanor, subsection (g) and 5 U.S.C. §552a(i) (1). Likewise, if a secretary, in an emergency, takes a shorthand transcription of a court order over the telephone, that transcription would automatically become a "record in a system of records" and "a record deposited in a public office." Its subsequent destruction, even when a copy of the court order arrives by mail, might become a felony, and its disclosure, except pursuant to the Privacy Act, a misdemeanor.

These retention requirements would impose an unprecedented burden on all governmental agencies involved in the legitimate and necessary interceptions of telephone conversations. To comply with the Privacy Act requirements, such agencies would have to develop and implement procedures for retaining all such "records" as well as an indexing system for storing and retrieving those records.

In addition, such requirements may be inconsistent with and interfere with the effective operation of national security programs. For example, as explained by the National Security Agency in its letter commenting on H.R. 4620 dated February 21, 1984, such retention requirements are inconsistent with requirements of the National Security Agency's signals intelligence mission. In the course of fulfilling the portion of this mission that is governed by the Foreign Intelligence Surveillance Act of 1978 statutory minimization procedures require deletion of personal identifiers in many cases, making Privacy Act compliance in those cases impossible.

CONCLUSION

As the above discussion illustrates, the Department of Justice has a number of concerns with H.R. 4826. As you know, Congress has labored for years to develop a balanced statutory scheme in the complex and highly technical area of electronic surveillance -- an area which already embraces three separate statutes. 2/ Any additional legislation must be crafted carefully to comport with that scheme and must avoid preventing legitimate and necessary uses of electronic surveliance. Similarly, in this complex area which involves numerous federal

---

2/ The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et. seq; The Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et. seq. and 47 U/S.C. § 605 which protects the privacy of radio communications.

agencies and affects a wide variety of highly sensitive activities, it is important that administrative flexibility be maintained. A statute that would flatly prohibit consensual monitoring except in very fixed and limited circumstances and would require all recordings or transcripts made under the statute to be retained as Privacy Act records on pain of criminal penalties would severely restrict this flexibility and is an over-reaction to conduct which did not involve law enforcement or intelligence activities. We believe that the nature of the activity here does not merit a federal criminal statute, but would be better addressed through administrative regulations or by an executive order that would not raise the concerns discussed above.

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
Office of Legislative Affairs

April 9, 1984

H.R. 4620 - Federal Telecommunications Privacy Act

Purpose. To determine what position the Administration should take on H.R. 4620, a bill that would essentially prohibit the nonconsensual recording of telephone conversations by Federal employees or officers.

Alternatives:

1. Do not seek changes to the bill; oppose it when it goes to the House floor.

2. Do not seek changes to the bill but, when it goes to the House floor, advise that "while the Administration does not object to House passage of the bill, it will seek amendments in the Senate."

3. Seek delay of full committee markup so that Administration can seek amendments to bill so that the Administration can take a position of (a) no objection to the bill or (b) support for the bill.

4. Other?

ID # 220631 CU

JV

AT001

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

COPY

Name of Correspondent: James Muir

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

Subject: Draft NSA answers to questions from the House Government Operations Committee concerning H.R. 4620, and draft CIA, Justice and GSA reports on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983."

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU HUR	ORIGINATOR	84/03/28	JV	C	84/03/30 JV
CU AT 18	D	84/03/28 JV		C	84/03/30 JV
CU FIEL	S	84/03/30 JV		A	84/03/30 JV
		/ /			/ /
		/ /			/ /
		/ /			/ /

Referral Note:

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

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

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

Comments: _____

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

5/81

THE WHITE HOUSE

WASHINGTON

March 30, 1984

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

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

SUBJECT: Draft NSA Answers to Questions From the House Government Operations Committee Concerning H.R. 4620 and Draft CIA, Justice and GSA Reports on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983"

Counsel's Office has reviewed the above-referenced proposed reports on H.R. 4620. The first answer on page 7 of the draft National Security Agency responses is inaccurate and should be changed. Service monitoring is not limited to checking equipment; it includes as well monitoring the performance of government employees involved in activities such as manning telephone banks, and accordingly can involve review of the contents of conversations.

We also object to the penultimate sentence of the draft Justice report, with its suggestion that the problem might be addressed by an executive order. No decision has been reached on this and accordingly the possibility should not be gratuitously raised. We recommend changing "addressed through administrative regulations or by an executive order that" to "addressed administratively in a manner that."

FFF:JGR:aea 3/30/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

March 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft NSA Answers to Questions From the House Government Operations Committee Concerning H.R. 4620 and Draft CIA, Justice and GSA Reports on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983"

OMB has asked for our views by 1:00 p.m. today on a variety of agency views on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983." This bill would essentially enact as a statute existing GSA regulations prohibiting one-party interception and recording of telephone conversations. The prohibition would apply to government telephones and discussions of government business by government employees on non-government telephones. No penalty would be imposed for violating the prohibition, but any recordings that are made would be deemed to be government records subject to the Privacy Act. Penalties under that act would accordingly attach to the destruction of tapes or transcripts, and agencies would be required to follow Privacy Act procedures governing maintenance of and access to the tapes and transcripts.

The material circulated by OMB includes draft NSA responses to questions submitted by the House Government Operations Committee. The responses generally point out the difficulties the bill would present for currently accepted intelligence gathering activities, and the burden Privacy Act coverage would impose on NSA record-keeping. The first response on page 7 dismisses a possible inconsistency in the bill by stating that "[s]ervice monitoring is performed to ascertain how well equipment is operating; it is not done to review contents of conversations." This is inaccurate; service monitoring often involves reviewing the contents of conversations, as when done to check the performance of employees manning government telephone banks. NSA should be advised to revise this answer accordingly. I hesitate to suggest an answer at this point, since the issue should be addressed by those at NSA who have studied the bill and considered its effect on the operations of their agency. We can review NSA's proposed new answer when submitted.

The CIA draft report notes that the bill would not directly affect the CIA since that agency is expressly exempt from the Federal Property and Administrative Services Act, which the bill would amend. The CIA report appropriately goes on to echo the concerns raised by NSA concerning the effect of the bill on NSA.

GSA's draft report simply recommends technical clarifications in the bill. The Justice draft report, however, vigorously opposes the legislation. Justice argues that the bill would adversely affect law enforcement, and lacks a viable exception for law enforcement activities. Justice also contends that the bill would interfere with existing communications security monitoring activites. These activities, conducted by Defense and NSA, include intercepting and recording conversations over official telecommunications systems to determine if users are protecting classified information. Finally, Justice argues that subjecting tapes and transcripts of recordings to Privacy Act coverage would impose intolerable administrative burdens.

Justice's report concludes by stating: "We believe that the nature of the activity here does not merit a federal criminal statute, but would be better addressed through administrative regulations or by an executive order that would not raise the concerns discussed above." I think we should object to the gratuitous suggestion of an executive order, and change "addressed through administrative regulations or by an executive order that" to "addressed administratively in a manner that."

Attachment

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

SPECIAL

March 27, 1984

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Department of Justice
Department of Defense
Central Intelligence Agency
National Security Council
General Services Administration

SUBJECT: Draft NSA answers to questions from the House Government Operations Committee concerning H.R. 4620, and draft CIA, Justice and GSA reports on H.R. 4620, the "Federal Telecommunications Privacy Act of 1983."

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 1:00 P.M. - March 30, 1984.
(NOTE: GSA's answers to the Committee's questions were sent without OMB clearance, and are attached FYI.)

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: A. Curtis
F. Reeder
M.A. Chaffee
F. Fielding
A. Donahue

NSA DRAFT

QUESTIONS FOR AGENCIES ON H.R. 4620,

FEDERAL TELECOMMUNICATIONS PRIVACY ACT

1. This bill presents an unusual circumstance in which a regulation is proposed to be transformed, with few changes, into a statute. Customarily, Congress reserves to the executive agencies, to determine by regulation, what the law should be in two kinds of situations. One is a situation where conditions are changing frequently, or where the consequences of the law cannot be predicted with much certainty. In those cases, an ability to rewrite the law quickly is important, and that, of course, is not the strength of the Congress. The other situation in which regulations are appropriate is one which requires considerable expertise to set detailed rules. In many areas, I think we must recognize, agencies are more able than the Congress to fill in the details of the policies we write.

With that long introduction, let me ask you:

A. Is telecommunications privacy an emerging area of the law, or is it an area which is well studied, where the effects of potential restrictions are well known?

Answer: Telecommunications privacy is an area of law already extensively dealt with in federal statutes; but the telecommunications field is one in which rapid and significant technological change is a constant factor making the effects of potential restrictions difficult to predict.

B. Does the list of permissible invasions of telecommunications privacy contained in existing regulations contain all those exceptions to the no-recording rule which might be acceptable? Is it possible, on the other hand, that as restrictions in this area become better known -- and I am sure that more agency employees will be reading the GSA regulations in light of their recent publicity -- that we will discover more situations in which permitting agencies to record conversations will help them to function better, at a cost in privacy loss which is worth bearing?

Answer: No. The list does not contain kinds of overhearings now exempt from the regulations by a footnote

incorporating by reference the Executive Order governing United States intelligence activities. It cannot be assumed that existing regulations would cover any situation that might arise in the future.

C. Given the modern array of telecommunications equipment, can we be sure exactly what constitutes listening-in upon, or recording, a telephone conversation? If we forbid that practice, just to cite one example with which we're all familiar, would the use of speaker-phones, which allow other people in an office to listen to a conversation, be prevented? As technology becomes even more sophisticated, might our concept of what constitutes listening-in or recording change?

Answer: The concept of listening-in is likely to change as equipment innovations proliferate and reasonable expectations of privacy change.

2. The GSA regulation which is now the law on recording of conversations on Federal telephones prohibits recording by anyone. H.R. 4620, on the other hand, prohibits recording by, or with the permission of, a Federal officer or employee. Do you believe that the law should be narrowed in this way?

Answer: The National Security Agency (NSA) defers to the General Services Administration (GSA) for the response to this question.

3. The regulation prevents the recording of any conversation on a Federal telephone, whereas the bill prevents recording only those conversations which involve the conduct of Government business.

A. Do you believe that the law should be narrowed in this way?

Answer: The NSA defers to the GSA for the response to this question.

B. The term "Government business" is not defined in the bill, and I don't recall it being defined in any existing statute. What does it mean?

Answer: NSA's assumption in analyzing H.R. 4620 is that the term "Government business" would include activities

conducted by Federal employees in performance of their duties and by Government contractors' employees in performance of the contracts.

4. The bill also differs from the regulation in that it applies to far more people than officials and employees of the Federal Government. The term "Federal officer or employee", for purposes of this bill, includes "any officer or employee of any contractor, advisory committee, or consultant of an agency."

A. What precedents are there for extending to employees of Government contractors statutes designed to control the behavior of Federal employees?

Answer: To NSA's knowledge none that control directly, as would H.R. 4620, the behavior of contractors' employees, as distinguished from control by virtue of the contract.

B. This extension could pose problems. Let me mention a few hypothetical situations that trouble me, and ask for your comments on them.

(1) An airline routinely monitors the telephone conversations of employees who make reservations over the phone. The airline sells tickets to Federal agencies. This bill permits "Federal agencies" to perform service monitoring, but makes no provision for such monitoring by Federal contractors. If the bill becomes law, does the airline have to give up either its Government business or its service monitoring practice? Could the airline continue to monitor commercial calls, but would it have to turn off the monitoring devices whenever a call came in from a Federal agency? Does the airline have to apply to GSA for permission to continue its service monitoring?

Answer: The airline's service monitoring would appear to be unaffected. As a mere ticket seller, the airline is not a government contractor as that term is generally applied in federal procurement practice.

(2) The president of a prime Federal contractor routinely records her own telephone conversations. She receives a call from an employee of another firm which does subcontract

work for her on both Federal and other jobs. Does the woman have to turn off her recorder whenever she and the subcontractor talk about one of the Federal contracts?

Answer: Yes, since she would be conducting Government business.

(3) The prime contractor must comply with an equal employment opportunity plan in order to maintain its Government business, and with EEO laws in general. The president who records her phone conversations calls her EEO officer. Does she have to turn off her recorder? Now she calls her environmental consultant to speak about compliance with Federal environmental laws which are not specifically mentioned in her Government contract. Does she have to turn off her recorder for this conversation?

Answer: No, since she would not be conducting Government business.

c. Although the bill includes contractors within the definition of "Federal employees", it does not include grantees or persons who have entered into other types of cooperative agreements with the Federal government. Is this distinction appropriate?

Answer: The NSA defers to the GSA for the response to this question.

5. The subject of telecommunications privacy obviously has two aspects, telecommunications and privacy. Any issues whose principal emphasis is telecommunications are appropriately administered by GSA. This legislation, however, seems to me to be motivated by a concern for privacy and to emphasize that aspect of the subject. In your view, should the general management and reporting requirements on pages 6 and 7 of the bill be administered by GSA, or by an agency which is more attuned to privacy concerns, such as the Justice Department or the Office of Management and Budget?

Answer: The NSA defers to the GSA for the response to this question.

6. The bill would make all recordings of telephone conversations by Federal employees "records in systems of records" for purposes of the Privacy Act of 1974. This application of the Privacy Act poses several problems which I would like to ask you about.

A. The Privacy Act has always applied only to records from which information is retrieved by the name of an individual or another identifier assigned to him. What would be the implications of subjecting to the requirements of the Act records from which information is retrieved in other ways?

Answer: Within NSA the resultant creation and continual updating of indexes would require, particularly for records stored in computers, a considerable sacrifice of technical expertise otherwise needed for critical intelligence tasks and would effect a significant loss of privacy of persons whose records would otherwise not have been accessible by name or personal identifier.

B. The Privacy Act applies only to records about United States citizens and resident aliens. What would be the implications of subjecting to the requirements of the Act records about other individuals?

Answer: It could be contended that NSA, and perhaps other U. S. intelligence agencies, would be obligated to respond to queries from foreign persons as to whether the intelligence files contain information about them.

C. To make available to individuals, under the Privacy Act, records which include references to those people, but are not now indexed by people's names -- or even, in some cases, have personal identifiers removed from them -- would seem to me to be counter-productive of privacy interests, as well as very costly. What is your judgment on this issue?

Answer: Yes, it would appear to be counterproductive and costly.

D. Recordings of telephone conversations are generally maintained under very tight control by the agencies which make the recordings. The Privacy Act sanctions a wide variety of dissemination of personal records without the permission of the individuals named in them. This statutory allowance for transfers of the information would override agency regulations which restrict dissemination. Would this change be beneficial?

Answer: At this time, it is unclear whether the Privacy Act rules permitting dissemination would override the Attorney General approved procedures which now limit dissemination of information concerning persons protected by the Privacy Act.

E. The Privacy Act gives people to whom agency records pertain a chance to correct misstatements in those records. How practical would it be for your agency to give people who are mentioned in recordings of telephone conversations an opportunity to correct statements made in those conversations?

Answer: Security classification requirements to protect signals intelligence sources and methods would preclude informing individuals about recordings of telephone conversations in which they had been named.

F. The Privacy Act also requires agencies to publish in the Federal Register notices which describe the systems or records about individuals which those agencies maintain. As far as your agency is concerned, would the publication requirement pose any logistical or security problems?

Answer: Logistical problems would not be substantial but security considerations would preclude detailed, informative descriptions of records systems.

G. The bill subjects Federal contractors and consultants to the Privacy Act provisions as well. How practical or reasonable is it to ask contractors and consultants to comply with those provisions? Can or should we require them, for example, to publish notices in the Federal Register, or to open their records to people who wish to correct statements in them?

Answer: The NSA defers to the GSA for the response to this question.

H. At the same time that subsection 113(g) which the bill would add to the Federal Property Act subjects agency recordings of telephone conversations to the Privacy Act, subsection (e)(1)(B)(II) commands that in the case of service monitoring,

no data identifying the caller shall be recorded by the monitoring party. Are these two provisions inconsistent?

Answer: No. Service monitoring is performed to ascertain how well equipment is operating; it is not done to review contents of conversations.

7. The bill provides no penalties for persons who record or listen-in upon telephone conversations when not permitted to do so. The only penalties created by the bill are for misuse of records under the Privacy Act of 1974. This means that the principal evil addressed by the bill is not deterred at all in the case of listening-in, where no records are made, and is deterred only indirectly in the case of recordings.

A. Is this an appropriate way to discourage practices we don't like, or should penalties be assessed for making impermissible recordings and listening-ins in addition to, or as a substitute for, Privacy Act violations?

Answer: The NSA defers to the GSA for the response to this question.

B. If penalties should be assessed for making impermissible recordings and listenings, what should they be?

Answer: The NSA defers to the GSA for the response to this question.

8. The bill stipulates that recordings of telephone conversations are public records for purposes of section 2071 of title 18, which establishes criminal penalties for tampering with such records.

A. Are you aware of any other statutes which designate specific documents as coming within the purview of section 2071?

Answer: No.

B. Does this provision create any difficulties for your agency?

Answer: At a minimum, the provision would add some administrative burden. There is potential for significant logistical, and perhaps operational, burdens. Since criminal

penalties could attach to mishandling these recordings, it is likely that a relatively complex process would be implemented to control them. Given the large number of recordings NSA handles (of which only a small, and hard to determine fraction might be affected by the bill), it is likely this provision would be costly.

9. The bill transfers the authority to approve recordings of telephone conversations from officials designated by agency heads to the agency information resource managers who are responsible for implementation of the Paperwork Reduction Act. Do you think that these information specialists are as able as currently designated officials to decide when public safety requires recordings, when a handicapped employee needs the assistance of a recording device to perform his job fully, or when service monitoring is appropriate for evaluating people's work?

Answer: The NSA defers to the GSA for the response to this question.

Central Intelligence Agency

Washington, D.C. 20505

DRAFT

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

Dear Mr. Chairman:

This is in response to your request for the views of the Central Intelligence Agency concerning H.R. 4620, a bill to amend the Federal Property and Administrative Services Act of 1949 (FPASA) to prohibit federal officials from monitoring or recording telephone conversations without the consent of all parties. Mr. Casey has asked me to respond on his behalf.

As drafted, H.R. 4620 would not affect CIA activities because the Agency is exempt from the underlying provisions of the FPASA that would be amended by the bill. See 40 U.S.C. § 474. As we have previously informed your Committee by letter dated 15 February 1984, notwithstanding our statutory exemption we have promulgated internal regulations that protect against abuses in connection with telephone monitoring. These procedures authorize monitoring or recording of telephone conversations by Agency personnel with one party's consent if conducted for authorized intelligence purposes and with appropriate senior approval.

Although in its current form H.R. 4620 would not have any impact on CIA activities, the bill could adversely affect the activities of other members of the Intelligence Community. In this regard, I note that the National Security Agency (NSA) has written to you identifying certain aspects of H.R. 4620 that could adversely affect the conduct of their activities. These concerns include the fact that only recordings made for counterintelligence purposes are exempted from the strictures of the bill, with no protection provided to other vital intelligence functions, and that the Privacy Act provisions of this bill could apply to records of any telecommunication recorded or monitored in accordance with other statutes. We endorse the views stated in the NSA letter and urge you to consider the equities of other intelligence agencies before acting favorably upon H.R. 4620.

If you should have any further questions, or if we can be of further assistance, please contact me or Robert Davis of my Office at 351-6126.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program. Thank you for the opportunity to comment on this legislation.

Sincerely,

Clair E. George
Director, Office of Legislative Liaison

GSA

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

DRAFT

Dear Mr. Chairman:

Thank you for the opportunity to testify before the Legislation and National Security Subcommittee on H.R. 4620, the "Federal Telecommunications Privacy Act of 1984." Upon further review of the legislation since the hearing, we have noted that certain portions of the bill may require technical clarification.

We recommend that the bill include a specific definition of "Federal officer and employee" to recognize that the legislation covers all Federal employees in the legislative, judicial and executive branches. The bill also should be amended to indicate that it will apply to all federal agencies as that term is defined in the Federal Property Act.

GSA further recommends that section 113(c)(1) of the bill be revised. This section provides for the recording of or listening-in upon a conversation with the consent of one party under the following condition:

> The recording or listening-in is performed for law enforcement purposes 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.

First, to the best of our knowledge, the Attorney General has not established guidelines for the Omnibus Crime Control and Safe Streets Act. This reference should be deleted. Second, the Attorney General has issued memoranda outlining procedures for lawful, warrantless interceptions of verbal communications. These memoranda provide that an Inspector General is an "agency head" for purposes of setting procedures for the interception of communications and reports directly to the Attorney General. This was done to insure the independence of an Inspector General when conducting investigations within his agency. We believe that section 113(c)(1) should be amended or the legislative history be drafted to specifically provide for continuation of this procedure.

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

Sincerely,

GSA

QUESTIONS FOR AGENCIES ON H.R. 4620,

Federal Telecommunications Privacy Act

1A. Is telecommunications privacy an emerging area of the law, or is it an area which is well studied, where the effects of potential restrictions are well known?

1B. Does the list of permissible invasions of telecommunications privacy contained in existing regulations contain all those exceptions to the no-recording rule which might be acceptable? Is it possible, on the other hand, that as restrictions in this area become better known — and I am sure that more agency employees will be reading the GSA regulations in light of their recent publicity — that we will discover more situations in which permitting agencies to record conversations will help them to function better, at a cost in privacy loss which is worth bearing?

1C. Given the modern array of telecommunications equipment, can we be sure exactly what constitutes listening-in upon, or recording, a telephone conversation? If we forbid that practice, just to cite one example with which we're all familiar, would the use of speaker-phones, which allow other people in an office to listen to a conversation, be prevented? As technology becomes even more sophisticated, might our concept of what constitutes listening-in or recording change?

RESPONSE

1A. Although telecommunications privacy has been a source of concern for many years (e.g., the Attorney General's memoranda on warrantless interceptions of

verbal communications), nevertheless, in our view, it is an area which has not been well studied and where the effects of potential restrictions are not well known.

1B. The current regulatory exceptions for consensual listening-in or recording represent the present operating needs of the Federal agencies; however, we agree that the list is not necessarily all inclusive and would require revisions if additional ligitimate needs arose.

1C. Regardless of the telecommunications technology utilized, e.g., whether speaker phones or more sophisticated devices, it is the practice of listening-in and recording which mandates controls, not the technology itself. The concept of listening-in or recording of telephone conversations will not change; only the capability may be increased by new technology.

2. The GSA regulation which is now the law on recording of conversations on Federal telephones prohibits recording by anyone. H.R. 4620, on the other hand, prohibits recording by, or with the permission of, a Federal officer or employee. Do you believe that the law should be narrowed in this way?

RESPONSE

2. GSA's present regulation only applies to executive branch officers and employees, as defined in its scope (41 CFR 101-37.102). HR 4620 would have the effect of broadening the applicability of the regulation by extending it to all Federal officers and employees. We believe that the coverage of the proposed legislation is desirable.

3. The regulation prevents the recording of any conversation on a Federal telephone, whereas the bill prevents recording only those conversations which involve the conduct of government business?

A. Do you believe that the law should be narrowed in this way?

B. The term "Government business" is not defined in the bill, and I don't recall it being defined in any existing statute. What does it mean?

RESPONSE

3A. We believe that HR 4620 expands the scope of the present regulation by adding non-GSA approved telephone systems to its coverage whenever such systems are being utilized to conduct official business. The present regulation only applies to those systems approved by GSA under its Property Act authorities and does not reach listening-in or recording of phone conversations conducted on the commercial network. Thus, we believe the regulation is not being narrowed but expanded.

3B. As to the term "Government business" we construe this to mean official Government business, i.e., any activity performed in furtherance of the agencies' missions and responsibilities. Our regulation prohibits the use of government telephones for other than official Government business and we do not think it is necessary to attempt to define Government business. (See 41 CFR 101-37.105-4).

4. The bill also differs from the regulation in that it applies to far more people than officials and employees of the Federal Government. The term "Federal officer or employee", for purposes of this bill, includes "any officer or employee of any contractor, advisory committee, or consultant of an agency."

A. What precedents are there for extending to employees of Government contractors statutes designed to control the behavior of Federal employees?

B. This extension could pose problems. Let me mention a few hypothetical situations that trouble me, and ask for your comments on them.

(1) An airline routinely monitors the telephone conversations of employees who make reservations over the phone. The airline sells tickets to Federal agencies. This bill permits "Federal agencies" to perform service monitoring, but makes no provision for such monitoring by Federal contractors. If the bill becomes law, does the airline have to give up either its government business or its service monitoring practice? Could the airline continue to monitor commercial calls, but would it have to turn off the monitoring devices whenever a call came in from a Federal agency? Does the airline have to apply to GSA for permission to continue its service monitoring?

(2) The president of a prime Federal contractor routinely records her own telephone conversations. She receives a call from an employee of another firm which does subcontract work for her on both Federal and other jobs. Does the

woman have to turn off her recorder whenever she and the subcontractor talk about one of the Federal contracts?

(3) The prime contractor must comply with an equal employment opportunity plan in order to maintain its government business, and with EEO laws in general. The president who records her phone conversations calls her EEO officer. Does she have to turn off her recorder? Now she calls her environmental consultant to speak about compliance with Federal environmental laws which are not specifically mentioned in her government contract. Does she have to turn off her recorder for this conversation?

C. Although the bill includes contractors within the definition of "Federal employees," it does not include grantees or persons who have entered into other types of cooperative agreements with the Federal government. Is this distinction appropriate?

Response

4A. While there may be other instances, one example of an Act's extension to contractor's employees is the Privacy Act. For specific purposes, the Privacy Act currently extends to a contractor's employees who are operating a system of records on behalf of an agency. 5 U.S.C. 552a(m).

4B. As in the case of application of the Privacy Act to Government contractors, 5 U.S.C. 552a(m), we believe that a Congressional determination would be required that the prohibition against listening-in and recording should be extended to contractors and other parties dealing with the Government and the specific circumstances when such prohibition would apply.

4C. As in our comment on 4B. above, we believe it is for the Congress to determine if the prohibitions of the bill should extend to grantees or persons who have entered into other types of cooperative agreements with the Federal government.

5. The subject of telecommunications privacy obviously has two aspects, telecommunications and privacy. Any issues whose principal emphasis is telecommunications are appropriately administered by GSA. This legislation, however, seems to me to be motivated by a concern for privacy and to emphasize that aspect of the subject. In your view, should the general management and reporting requirements on pages 6 and 7 of the bill be administered by GSA, or by an agency which is more attuned to privacy concerns, such as the Justice Department or the Office of Management and Budget?

Response

5. In view of GSA's special authorities for telecommunications and its government-wide management responsibilities in the area, it is appropriate for GSA to continue its role in supervising the utilization of telecommunications throughout the Government. We believe that our regulation's reporting requirements help to enable GSA to ensure the proper use of communication systems.

6. The bill would make all recordings of telephone conversations by Federal employees "records in systems of records" for purposes of the Privacy Act of 1974. This application of the Privacy Act poses several problems which I would like to ask you about.

A. The Privacy Act has always applied only to records from which information is retrieved by the name of an individual or another identifier assigned to him. What would be the implications of subjecting to the requirements of the Act records from which information is retrieved in other ways?

B. The Privacy Act applies only to records about United States citizens and resident aliens. What would be the implications of subjecting to the requirements of the Act records about other individuals?

C. To make available to individuals, under the Privacy Act, records which include references to those people, but are not now indexed by people's names — or even, in some cases, have personal identifiers removed from them — would seem to me to be counter-productive of privacy interests, as well as very costly. What is your judgment on this issue?

D. Recordings of telephone conversations are generally maintained under very tight control by the agencies which make the recordings. The Privacy Act sanctions a wide variety of dissemination of personal records without the permission of the individuals named in them. This statutory allowance for transfers of the information would override agency regulations which restrict

dissemination. Would this change be beneficial?

E. The Privacy Act gives people to whom agency records pertain a chance to correct misstatements in those records. How practical would it be for your agency to give people who are mentioned in recordings of telephone conversations an opportunity to correct statements made in those conversations?

F. The Privacy Act also requires agencies to publish in the Federal Register notices which describe the systems or records about individuals which those agencies maintain. As far as your agency is concerned, would the publication requirement pose any logistical or security problem?

G. The bill subjects Federal contractors and consultants to the Privacy Act provisions as well. How practical or reasonable is it to ask contractors and consultants to comply with those provisions? Can or should we require them, for example, to publish notices in the Federal Register, or to open their records to people who wish to correct statements in them?

H. At the same time that subsection 113(g) which the bill would add to the Federal Property Act subjects agency recordings of telephone conversations to the Privacy Act, subsection (E)(1)(B)(II) commands that in the case of service monitoring, no data identifying the caller shall be recorded by the monitoring party. Are these two provisions inconsistent?

RESPONSE

6A-H. Under the Privacy Act, the records currently concern personal data relative to an individual. Recordings of the content of telephone conversations may or may not relate to such personal data. If the Privacy Act is applied, this legislation would extend the Act's coverage beyond the present "personal" data to any reference, personal, policy or otherwise, if an individual is mentioned. If Congress does apply the Act, we would expect the following actions to occur. All recordings would become records within a separately designated system of records within each agency. This system of records would be classified most likely by the names of the individuals either parties to or mentioned in the conversation. The system of records itself would be controlled by the agency in the same manner as all other Privacy systems of records, i.e., published in the Federal Register with any applicable routine use listed, procedures established for the maintenance of such systems, access procedures, etc.

While all of the concerns addressed in your specific problems in 6A-H. above can be handled by the development of agency procedures, it may prove to be burdensome for the agencies. We believe that it is for the Congress to decide the extent to which Privacy Act rights should be extended beyond the current scope of the Act. With respect to the bill's provisions concerning the Privacy Act and the effect of the bill on the operation of other agencies, we understand that the National Security Agency (NSA) and the Department of Justice have expressed serious concerns about the bill, which they will communicate to the Committee.

7. The bill provides no penalties for persons who record or listen-in upon telephone conversations when not permitted to do so. The only penalties created by the bill are for misuse of records under the Privacy Act of 1974. This means that the principal evil addressed by the bill is not deterred at all in the case of listening-in, where no records are made, and is deterred only indirectly in the case of recordings.

A. Is this an appropriate way to discourage practices we don't like, or should penalties be assessed for making impermissible recordings and listening-ins in addition to, or as a substitute for, Privacy Act violations?

B. If penalties should be assessed for making impermissible recordings and listenings, what should they be?

RESPONSE

7A. & B. The specific penalties provided go only to the handling of an actual recorded conversation, not the practice which created the recording. Normally the conduct of government officers and employees is subject to the administrative disciplinary procedures of their respective agencies. The violation of either the listening-in or recording prohibitions will continue to be handled in the same manner as all other violations by employees of their duties as public officials.

8. The Bill stipulates that recordings of telephone conversations are public records for purposes of section 2071 of Title 18, which establishes criminal penalities for tampering with such records.

A. Are you aware of any other statutes which designate specific documents as coming within the purview of section 2071?

B. Does this provision create any difficulties for your agency?

RESPONSE

8A. We are not aware of any other statute which designates specific documents as coming within the purview of section 2071.

8B. We do not know any specific difficulties if applied to telephone recordings.

9. The bill transfers the authority to approve recordings of telephone conversations from officials designated by agency heads to the agency information resource managers who are responsible for implementation of the Paperwork Reduction Act. Do you think that these information specialists are as able as currently designated officials to decide when public safety requires recording, when a handicapped employee needs the assistance of a recording device to perform his job fully, or when service monitoring is appropriate for evaluating people's work?

RESPONSE

9. We certainly believe that the senior agency official for purposes of the Paperwork Reduction Act is capable of controlling and coordinating the agency's responsibilities for determinations as to permissible listening-in or recording of telephone conversations.

ID # 204204 CU

WT001

JV

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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

COPY

Name of Correspondent: James Muir

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

Subject: Statement of Charles Wick before the Subcommittee on Legislation and National Security concerning H.R 4620 The Federal Telecommunications Privacy Act/ 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
CUHILL	ORIGINATOR	84 02 28 JV		C	84 03 01 JV
CUFT 18	Referral Note: D	84/02/28 JV	NAN	C	84/03/01 JV
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:	/ /			/ /
	Referral Note:				

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

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

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

Comments: Provided by copy to John Roberts

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

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
Department of Defense
Central Intelligence Agency
National Security Council
General Services Administration

SUBJECT: United States Information Agency testimony on H.R. 4620, the "Federal Telecommunications Privacy Act."

(GSA testimony was sent to you on 2/27/84, and NSA testimony will be circulated later today, 2/28/84.)

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, Jim Jordan, P. Schlueter, Arnie Donahue, Frank Reeder, Fred Fielding, Mike Uhlmann

STATEMENT OF

CHARLES Z. WICK

DIRECTOR, UNITED STATES INFORMATION AGENCY

BEFORE THE SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

HOUSE GOVERNMENT OPERATIONS COMMITTEE

H.R. 4620

THE FEDERAL TELECOMMUNICATIONS PRIVACY ACT OF 1984

March 1, 1984

Mr. Chairman, Members of the Committee, it is customary for witnesses to begin their statements before a Committee of Congress with the phrase, "It is a pleasure to appear before the Committee today." In fact, in this instance, for me to say that would be disingenuous. I am not, unfortunately, pleased to be here under the present circumstances. I can only hope, Mr. Chairman, that out of these hearings will come a clarification of issues and a codification in law which will help others avoid mistakes which I have made in the past.

From time to time during my tenure as Director of the United States Information Agency, I recorded telephone calls--or directed that notes on them be taken down by a secretary. I have used recording equipment in the way others use written notes, to help me make more fully informed decisions and to convey these decisions to associates effectively. My purpose was always to extend the reach of my own memory, never to threaten or humiliate others. It has, in retrospect, become clear to me that in trying to be meticulous about my own managerial tasks, I frequently ignored the potential impact on others. As I mentioned in a statement released January 9th, a copy of which I am submitting, with your permission, for inclusion in the record, I now understand that the recording of others without their consent is unfair, invades their privacy, and could lead to other, more dangerous practices. I have apologized, either in person or in writing, to all those I may have harmed by my taping practices and very much regret any embarrassment the revelation of that may have caused them.

The staff of the Committee on Foreign Affairs of the House of Representatives looked into this matter fully. Their report discusses in some depth the procedures I followed and concluded that those practices did not "reveal any abuse of...official position for political or personal gain, nor [did they] contain any statements which would compromise the integrity of the Agency." Pursuant to the recommendation of Chairman Dante Fascell and the GSA, I can report that USIA is working expeditiously to put into place clear regulations governing future actions.

I have reviewed the bill introduced by you, Mr. Chairman, H.R. 4620, the Federal Telecommunications Privacy Act of 1984. My comments are, of necessity, largely personal. I know that the Committee will be calling as witnesses representatives of various other government agencies who will avail themselves of an opportunity to discuss with you how a statutory enactment such as this would represent could affect their current operations. I would not presume to address those issues. What I did was a violation of a General Services Administration Property Management Regulation. While I believe I am now more sensitive to the import of such a regulation, the fact remains that what I did was not illegal--not in violation of law. Had your bill been in place at that time, I can assure you I would have been more attentive to the issue.

Mr. Chairman, Members of the Committee, at this time I would be pleased to respond to any questions you may care to ask.

United States Information Agency
Washington, D.C. 20547

USIA

Announcement No. 11
January 10, 1984

STATEMENT BY DIRECTOR CHARLES Z. WICK AND AGENCY FACT SHEET

The following Statement and Fact Sheet were released by USIA on January 9, 1984.

Today I have made available to the Senate Foreign Relations Committee and House Foreign Affairs Committee tape cassettes, transcripts of tape recordings, and other related material requested by the two Committees. The material delivered includes all tape recordings I know to exist of telephone conversations made or received by me during my entire time in government.

This seems an appropriate occasion for me to sum up my feelings about this controversy.

Since becoming Director of the United States Information Agency, I have from time to time taped my communications with others, my plans and my reminders to myself. I used recording equipment in the way others use written notes—to help me make more fully informed decisions and to convey these decisions to associates more effectively. My purpose was always to extend the reach of my own memory, never to threaten or humiliate others. But it has become quite clear to me that in trying to be meticulous about my own managerial tasks I frequently ignored the potential impact on others. I now understand that taping of others without their consent is unfair, invades their privacy, and can lead to other, more dangerous practices.

I freely apologize to anyone I have harmed by my taping practices. I very much regret any embarrassment the recent revelations may have caused them.

During the first days of this controversy, the public received a good deal of information, not all of which was accurate. Some of the misinformation came from my anxiety and faulty recollection. I regret this. We have now finished collecting the transcripts in our possession and are compiling a chronology of the taping. I hope this information will put the early confusion to rest and show to the Committees of the Congress that the tapes do not reveal any wrongdoing.

I hope even more that the early confusion will not distract attention from the truly important features of this episode. I am sorry for my insensitivity in engaging in this practice and I hope all the current public attention will lead other government officials to behave more thoughtfully than I did.

DISTRIBUTION: X - All Employees in the U.S.

FACT SHEET
UNITED STATES INFORMATION AGENCY

Eighty-one transcripts and four cassettes of telephone conversations recorded by USIA Director Charles Z. Wick were made available today to the Senate Foreign Relations Committee and the House Foreign Affairs Committee. The transcripts so delivered are of conversations recorded between July 8, 1981 and September 6, 1983. The practice has been discontinued. The number of telephone conversations recorded, with or without the consent of the other party, was only a small percentage of the Director's telephone calls. Many transcripts, once they served the legitimate purpose of conveying information for followup staff action, were discarded. The transcripts were not circulated beyond a small number of members of the Director's staff.

The Agency also made available to the Committees transcriptions of stenographic notes frequently taken by the Director's secretaries when he was talking on the telephone. Such notes are of conversations starting with May 27, 1982 and concluding on December 23, 1983. The notes provided are from 83 telephone conversations. The practice of taking such stenographic notes without notice to the other party has also been discontinued.

Stenographic notes were generally discarded once appropriate followup actions were taken by the Director or members of his staff. This was also the case of many of the transcripts of recorded telephone conversations; and all but a few of the cassettes were reused once a transcript was made. Those that were not reused have been turned over to the Committees.

98TH CONGRESS
2D SESSION

H. R. 4620

To prohibit the recording of conversation made on the Federal telecommunications system, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 24, 1984

Mr. BROOKS introduced the following bill; which was referred jointly to the Committees on Government Operations and Post Office and Civil Service

---

A BILL

To prohibit the recording of conversation made on the Federal telecommunications system, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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.) or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

"(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 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.

"(4) 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.

"(5) 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 (3), (4), or (5) 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 (5) 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 (3), (4), or (5) 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 be accountable for information concerning the use of listening-in or recording of telephone conversations in the Federal Government as requested under paragraphs (3), (4), and (5) of subsection (c).

"(2) The General Services Administration shall periodically review the listening-in programs within the agencies to ensure that agencies are complying with Federal property management regulations.

"(3) The General Services Administration shall provide assistance to agencies in determining what communications devices and practices 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.

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

"(g) For purposes of section 552a of title 5, United States Code, any recording or transcription of a conversation made under (or in violation of) this Act shall be deemed to be a record in a system of records (as such terms are defined in subsection (a) (4) and (5) of such section) which pertains to each party to such conversation, and each such party shall have all the rights and remedies afforded to an individual under such section.

"(h) Any recording or transcript of a conversation made under (or in violation of) this Act shall constitute a record deposited in a public office for purposes of section 2071 of title 18, 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 any contractor, advisory committee, or consultant of an 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 tele-

phones 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.".

O