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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 6, 1984

REMARKS OF THE PRESIDENT
UPON DEPARTURE
FOR CAMP DAVID

The South Lawn

3:15 P.M. EST

THE PRESIDENT: I just wanted to say one thing about the economy, and I think all of us can look forward to 1984 with even more confidence in view of the unemployment figures that we were handed this morning: that unemployment went down again in the month of December; 335,000 more people were working in December than were working in the month before. And it means that about 4 million more people are at work now than were at work a year ago in December.

And I think this is -- the rate, counting in the military, which I think is the only way to count it -- total unemployment is now 8.1 percent. And, as I say, I think it's encouraging news for all of us, and we're going to keep on.

Q Mr. President, do you think if we spend $1 billion more on Central America that that would somehow stop the Sandinistas from doing what they've been doing?

THE PRESIDENT: Andrea, I don't know -- I've only known this -- and I have spoken of this several times before -- I think that we haven't been doing all that should be done. That was one of the reasons for having a Commission. I have not yet obtained their -- their report.

But, solving the social and economic problems, or helping them solve them, themselves, down there is essential. Just as it's essential that we help provide for their security while they're instituting those reforms.

And we haven't been allowed to do as much as we should do.

Q Is the Kissinger group calling for a lot more money? Is that what your understanding is -- that the Kissinger group will call for a lot more money?

THE PRESIDENT: That I don't know. And, of course, the definition of what a lot more is could be subject to interpretation.

Q Mr. President, do you condone the taping on the telephone by Charles Wick?

THE PRESIDENT: I'm not going to comment further other than to say that I don't think that [redacted]s a dishonorable man in any way. And the nature of the things that he was recording and that -- I can understand his forgetting sometimes when he was talking to people particularly that he knew -- but, the purpose of that was different than it is from someone that is trying to keep a record on other people's conversations.

What he was actually trying to do was be able to immediately transcribe so that he could provide the suggestions that were being discussed to the people that would have to implement them.

And I have heard there are some rumors around. Let me just say this. He has done a splendid job. I think the Voice of America, the whole United States Information Agency is far superior to anything that has ever been and he's going to continue there.

Q Mr. President, The New York Times claims he lied to them about the taping.

Q Did he lie to them?

THE PRESIDENT: That's their statement.

END 3:20 P.M. EST

)ther, Marilyn, who said she believed that :kson's intervention could "only help and t hurt" her son's chances for release.

The Reagan administration seemed to be eping Jackson at arm's length. White ouse staffers explained that the president id refused to talk to Jackson on the phone r fear of giving his diplomatic "grand-anding" any official status—and, as some lmitted, because of domestic political con-lerations as well. "It's touchy. If you take e call, you confer stature on a Democratic esidential candidate," one aide said. "But you don't talk to him, you risk making our oblem with blacks worse."

Mood Shift: By the time Jackson and his itourage arrived in Syria, however, the ansatlantic mood seemed considerably nproved. Landing in Damascus on a starlit sert night, Jackson emerged from the ane with both arms outstretched in a -for-victory salute. He was met by Syrian eputy Foreign Minister Issan al Naeb and the U.S. ambassador to Syria, Robert P. aganelli, who had been conducting the uitless negotiations for Goodman's re-ase. "My presence shows our interest in is effort," Paganelli said, belatedly confer-ng the Reagan administration's blessing.

Some U.S. officials suspected that the yrians might want to embarrass Reagan by rning Goodman over to Jackson; others peculated that the Assad government could ave better reasons for letting him go—Goodman may have become an obstacle to uiet discussions with the United States bout Syria's role in the future of Lebanon. eyond those geopolitical imponderables, owever, one thing seemed clear: Jesse Jack-on's venture into troubled waters had won im the attention of all parties to the dispute, s well as that of the American voting public ack home.

OM MORGANTHAU with ELIZABETH O. COLTON n Damascus and THOMAS M. DeFRANK with Reagan

Thayer: Inside and Out?

Paul Thayer, a World War II Navy fighter ace who rose from test pilot to chief executive of one of the nation's largest defense conglomerates, last year became President Reagan's designated tough guy on U.S. military spending. In just one year as deputy secretary of defense, Thayer's commanding management style was credited with setting the Pentagon's procurement program on a more rational and efficient path. But last week there were growing indications that Thayer's personal mission may be aborted by a Security and Exchange Commission investigation that reportedly will link him with "insider trading" in the stock market.

Bruce Hoertel

DOD's Thayer: Master of the shoot-out

The SEC investigation began early last year as a routine inquiry. Several large stock purchases had been made just prior to the announcements of certain corporate merger or takeover plans—announcements that generally trigger profitable activity in the stocks involved—and the commission wanted to make sure that the purchases did not involve illegal trading. Among the stock transactions studied were those involving LTV Corp., where Thayer was chief executive officer, and two major companies—Allied Corp. and Anheuser-Busch Inc.—where Thayer served as a director. The investigation led to a Dallas stockbroker named Billy Bob Harris, who, along with several of his clients, made profitable purchases just before transactions involving those companies were made public. Though all denied that their investments were based on inside information, the SEC received information that Thayer knew Harris and at least one of his clients—a 38-year-old divorcée whom Thayer talked to by phone on the days some of the stock buys in question were made.

Tarred? Thayer, who is not alleged to have made any purchases himself, has denied any wrongdoing. And after a couple of months of negotiations with those who profited from the deals, the SEC has been unable to reach any settlement. Even though the transactions all took place before Thayer decided to join the government, the investigation seems certain to jeopardize Thayer's position in the Reagan administration, which was embarrassed once before when Thomas C. Reed, a presidential adviser, left office after similar charges. "That's not something you want the No. 2 man in the Defense Department to be tarred with," says a veteran Pentagon official. That is especially true, adds a senior Defense official, when he is now ruling on defense expenditures affecting these same

Tape Troubles—Again

If the Watergate scandal taught politicians anything, it was the danger of making secret tape recordings—and the peril of trying to deny an embarrassing truth. Both lessons were apparently lost on Charles Z. Wick, the California entrepreneur and longtime friend of Ronald Reagan who romps from ruckus to ruckus as head of the United States Information Agency.

From early 1982 until last July, Wick taped a number of office telephone conversations on a Dictaphone without informing the other parties involved—including Republican Sen. Mark O. Hatfield of Oregon, Arms Control and Disarmament Agency Director Kenneth Adelman and former Ambassador Walter Annenberg, Wick's and Reagan's scheduled host for New Year's Eve. Then, last week, he denied the fact to reporters from The New York Times. When it turned out that they had obtained leaked transcripts of the recordings, Wick finally admitted that he had taped "for a limited time" a "small percentage" of calls "solely to ensure accuracy and facilitate appropriate follow-through." Although he "often" warned those at the other end of the line, Wick said, he "did not do this consistently . . . I can understand how some might find it intrusive."

USIA's Wick: Ruckus

James D. Wilson—Newsweek

It seemed that someone at USIA was trying to embarrass the boss, who has drawn heavy criticism for his lack of foreign-affairs experience (recently, he suggested that British Prime Minister Margaret Thatcher failed to support U.S. intervention in Grenada because she was a woman), his "Wick-ed" temper and his free use of official perks. In fact, taping of telephone conversations is not illegal under federal law or in the District of Columbia, although it would be a crime in at least 12 states. Two separate congressional committees announced they were investigating the matter. But President Reagan had no intention of asking for old friend Wick's resignation, even though aides made clear that Reagan does not approve of secret taping. "He doesn't do it himself," said spokesman Larry Speakes. "It's not done in the White House—since 1974."

A Reagan Crony on the Line

Flamboyant Charles Wick admits to making secret tapes

He travels surrounded by four bodyguards, stays in $200-a-night hotel suites and hands out $5 tips. His hosts are often given precise instructions to provide him with a telephone at all times, a bed for a nap in the afternoon, even a piano to play by night. Security guards at his Washington headquarters are supplied with his picture and told never to ask for his identification. The United States Information Agency (then called the International Communication Agency) was a neglected foreign policy backwater before Charles Z. Wick, 66, became its director in 1981, but the former Hollywood moviemaker, venture capitalist and, most important, close friend of Ronald Reagan's has brought to the agency righteous zeal and a show-biz tone. He has also earned an uncomplimentary reputation for a bumptious manner and an attention-getting life-style.

CYNTHIA JOHNSON

The U.S. Information Agency director at his desk in Washington

Clout and money, but a bumptious manner and a show-biz tone.

Last week Wick was back in the headlines, this time for covertly making tapes of his phone conversations. He at first denied that he secretly taped calls, but when the New York *Times* confronted him with the leaked transcripts of conversations with half a dozen notables, including Senator Mark Hatfield, Actor Kirk Douglas and former Ambassador to Great Britain Walter Annenberg, Wick admitted that he had "in haste" failed to inform a "small percentage" of his callers that they were being tape-recorded. He apologized, saying, "I can understand how some might feel that it was intrusive." Wick, who in 1981 had been advised by the USIA general counsel not to secretly record his calls, says he disconnected his machine last July.

The furor over the disclosure is indicative of the growing sensitivity to the secret taping of phone calls both inside and outside government. The practice is "an offense against good reporting, against good business and particularly against good government," declares *Times* Columnist William Safire, who broke the story and who is still smarting from a wiretap of his own calls ordered by the Nixon Administration in 1969. Any surreptitious use of tape recorders is "flat wrong," says St. Petersburg (Fla.) *Times* Editor Eugene Patterson. "Bugging is bugging, no matter what you call it." Many major press organizations, including the Washington *Post*, the Los Angeles *Times* and CBS, bar reporters from secretly taping calls. New York *Times* Executive Editor A.M. Rosenthal reminded his staff of their paper's own strict rules the day the *Times* printed the Wick story. The practice is illegal in at least a dozen states, and the American Bar Association Standing Committee on Ethics and Professional Responsibility considers it unethical for lawyers to tape conversations surreptitiously. "It's not done at the White House," said Spokesman Larry Speakes. "Not since 1974." Before the Watergate scandal, however, telephone conversations were routinely transcribed at many Government agencies. And despite the policies of their employers, many journalists continue to tape calls, claiming the interests of accuracy.

Wick used the same justification. Few suggested that he had malicious motives. From the White House, he received only a mild rebuke. Speakes shrugged, noting that the President "doesn't do it himself and I don't think he generally approves of it." One top official predicted that the controversy would "blow over pretty soon" and that Wick's job was "safe."

The White House has become accustomed to riding out storms stirred by Charles Wick. Many in Washington derided his appointment, noting that he had once arranged dance music for Tommy Dorsey and produced a movie called *Snow White and the Three Stooges.* In addition, he had a total lack of experience in foreign affairs.

USIA staffers feared that Wick would transform the carefully neutral Voice of America, the broadcast arm of the agency, into a propaganda organ. They were not reassured when he staged the overblown 1982 TV spectacular *Let Poland Be Poland,* starring a dozen Western heads of state and Frank Sinatra singing in Polish.

More worrisome to many of his subordinates was a leaked memo from a Wick aide calling on the agency to stress "propaganda" over news. Although some complain that Wick's idea for the Voice of America to broadcast editorials undermines the station's credibility, regular news broadcasts continue to be unbiased. The career bureaucrats at USIA also began to complain less when Wick managed to boost the agency's funding from $426.9 million in 1980 to $659 million in 1984, reversing a decade-long budget decline. The added funds will permit the agency to replace obsolete equipment, including some radio transmitters captured from the Germans in World War II. Wick's major asset is his good friend. "He is tight as a tick with the President," says a top White House aide. Unlike most previous USIA chiefs, Wick attends the Secretary of State's morning staff meetings. This inside track, Wick says, enabled him to quickly prepare an audiovisual recording and translation of the voices of the Soviet fighter pilots as they moved in to destroy Korean Air Lines Flight 007 last September. The presentation was used with dramatic effect by U.S. Ambassador Jeane Kirkpatrick at the United Nations.

But Wick obscures his accomplishments with showy Babbittry. His backslapping camaraderie grates on foreign diplomats. Last month he astonished an audience by suggesting that British Prime Minister Margaret Thatcher disapproved of the Grenada invasion because "she is a woman." Within the USIA, Wick is regarded as temperamental and high-handed by much of his staff. The victims of his ego make him pay for it in time-honored Washington fashion: they leak his peccadilloes to the press. —*By Evan Thomas. Reported by Jay Branegan and Christopher Redman/Washington*

United States Information Agency

Washington, D.C. 20547

Office of the Director

USIA

January 9, 1984

STATEMENT
BY
CHARLES Z. WICK
DIRECTOR, UNITED STATES INFORMATION AGENCY

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.

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News Release
United States Information Agency
Washington, D.C. 20547

USIA

January 9, 1984

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 true 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.

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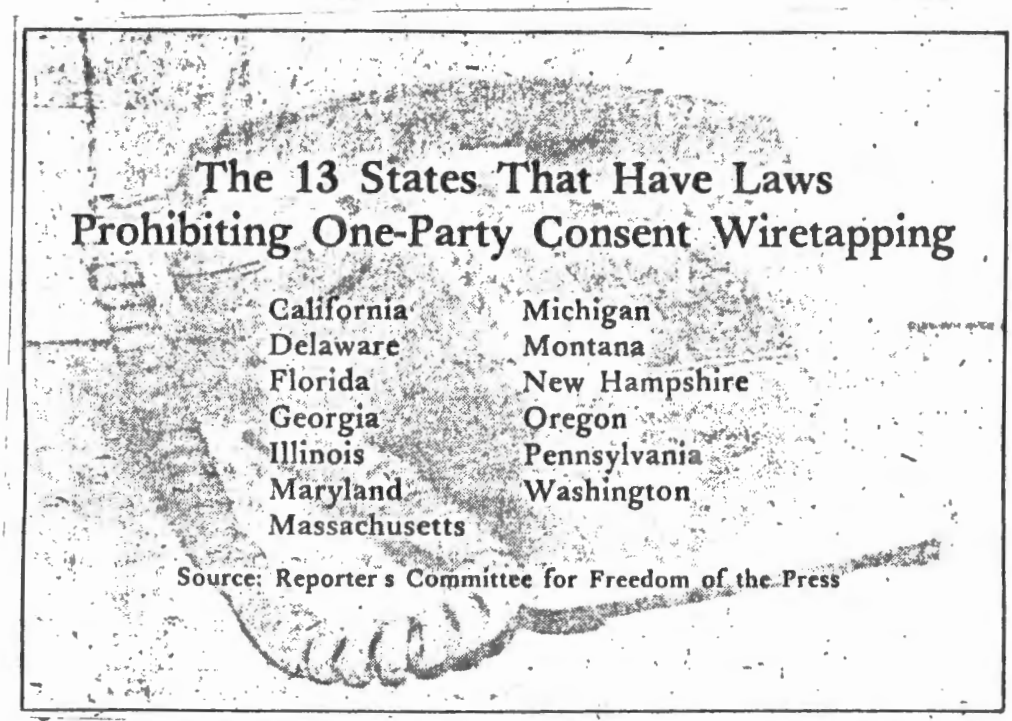
Message:

Rules Unclear on Single-Party Taping

By Francis J. Flaherty
National Law Journal Staff Reporter



WHEN REAGAN administration official Charles Z. Wick admitted recently that he had taped some of his telephone conversations last year, he focused attention on "consensual surveillance" — a common but little-studied type of monitoring governed by a confusing patchwork of state laws, federal regulations and private policies.

Consensual surveillance involves the taping of a conversation by one party to the conversation without the knowledge of the other party. Also known as "participant monitoring," the practice is much less familiar to the public than non-consensual surveillance, in which a third party — often a law-enforcement officer — records the conversation of unsuspecting participants.

An • NLJ • News Analysis

Nonetheless, consensual surveillance is of major importance to some groups: to journalists who want to tape their interviews for sensitive stories, to insurance claims adjusters who want to record the statements of witnesses to accidents, to police officers who employ informants and to business executives who desire records of major contract discussions.

"We get a few calls a month" from journalists worried that their covert taping of interviews may subject them to criminal sanctions or civil damages, said Judy Lynch, assistant director for legal defense for the Washington, D.C.-based Reporters Committee for Freedom of the Press. And law-enforcement agencies use consensual surveillance "far more extensively" than the non-consensual kind, said James G. Carr, a federal magistrate in Toledo, Ohio, and an expert in the law of electronic surveillance.

"The largest number of overheard conversations are with the consent of one party to the conversation," estimated Washington, D.C., lawyer Robert Ellis Smith in his 1980 book, "Privacy: How to Protect What's Left of It."

Despite its prevalence, consensual surveillance is subject to a confusing and contradictory array of laws and regulations.

Under federal law, for instance, consensual surveillance is explicitly permitted by Title III of the Organized Crime Control and Safe Streets Act of 1968. While the law generally bans non-consensual surveillance by everyone except law-enforcement officers who have secured a warrant, it generally allows warrantless consensual surveillance, by both private persons and police officers, unless done "for the purpose of committing any criminal or tortious act" or "any other injurious act." 18 U.S.C. 2510-2520.

Forbidden in 13 States

But despite federal approval, 13 states forbid the practice, said Ms. Lynch. The states are California, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania and Washington, she said.

The prohibitions vary widely from state to state. The Pennsylvania ban, for example, applies to both private citizens and the police, while in other states the law applies only to private citizens. And the California law exempts the victims of serious felonies — such as the family of a kidnap victim that tapes a ransom call, said Mr. Smith, who publishes the Washington, D.C.-based Privacy Journal.

"The most common exceptions," said Ms. Lynch, "are for telephone companies and police officers." Penalties also differ. While some of the state laws carry only civil fines or civil-damage provisions, others classify violations as misdemeanors. California, for example, imposes a relatively strict maximum penalty of one year in jail and a $2,500 fine.

The precise scope of these state laws is often unknown. "The statutes are of various vintages, and the interpretations are sometimes very unclear," said Magistrate Carr.

Under the Florida law, for example, it is unknown whether the ban applies to interstate phone calls made from Florida as well as to intrastate calls. The issue is important to Mr. Wick, who is the director of the United States Information Agency, because two of the calls he allegedly taped were made last March from Palm Beach, Fla., to James A. Baker 3d, the White House chief of staff, in Washington, D.C. The District of Columbia has no ban on consensual surveillance.

The Florida law "is simply silent" about the types of phone calls it covers, said Ms. Lynch. Other unresolved issues include whether these state laws cover both wire communications and in-person conversations, and whether they pertain both to recording devices and to third parties who covertly listen to a conversation — through a speaker phone, for instance — with the consent of only one party.

Court Tests Rare

The rarity of court tests of these laws compounds the interpretative problems. "There are very few cases" brought under these statutes, said Herman Schwartz, a professor at

American University's Washington College of Law in Washington, D.C. This paucity of cases, Professor Schwartz and others said, has stalled judicial clarification of the laws.

Besides these 13 state laws, there are also some federal administrative regulations governing consensual surveillance. Since the late 1940s, for instance, the Federal Communications Commission has required interstate phone companies to enforce the "beeper rule" — a regulation that requires persons taping calls to use a 15-second beep to apprise the other party of the taping.

But because "Congress and the states are now involved" in either approving or banning consensual surveillance, the FCC proposed late last fall to repeal the regulation, said an FCC attorney who declined to be identified. Both the difficulties of detecting violations and the "weak penalties" of the rule, which at its strictest requires removal of the offending customer's phone, are other reasons that "we thought we'd back out," he added. The FCC proposal has not yet been approved, however.

Similarly, the General Services Administration has a rule that forbids most federal employees from the "listening in or recording of telephone conversations." Promulgated under the GSA's power to manage federal property, the 1979 rule, which carries such administrative penalties as reprimands and suspensions without pay, contains exemptions for criminal investigations, counter-intelligence operations and other matters, said Frank J. Carr, an assistant GSA administrator.

While the GSA believes such surreptitious surveillance is "an undesirable practice," the agency has difficulty discovering violations and making sure people know there is a policy" against such monitoring, said Mr. Carr. Although the GSA is investigating Mr. Wick's tapings, that probe is in fact "the first time" that a putative violation of the rule "has come to my attention," he said.

Private groups have also promulgated policies against consensual surveillance. Such news organizations as CBS Inc., for example, have written rules forbidding covert tapings by their journalists.

And 10 years ago the American Bar Association concluded that it is unethical for attorneys — except prosecutors — to record conversations secretly. The ABA statement, published as Formal Opinion 337 in 1974, has been adopted by at least seven state bar associations — those in Arizona, California, Colorado, Indiana, Louisiana, Michigan and New York — as well as by several local bar groups, said Professor Schwartz.

Warrants Needed?

This patchwork of public and private rules mirrors the wide range of opinions about consensual surveillance. Mr. Smith, for instance, does not believe "the police should need a court order" for consensual surveillance because "people don't have an expectation of privacy when they talk to the police." But Magistrate Carr thinks "a warrant should be required when possible" for such monitoring.

And while many journalists feel that private consensual surveillance should be permitted, Mr. Smith favors an outright ban on it, although he is "not sure if a criminal sanction is appropriate, maybe just civil damages." Still others suggest a middle position, in which such private surveillances are generally barred, except in specified instances in which the individual wishes to protect himself from wrongdoing or from an inaccurate account of a conversation.

But — whatever their views — most observers agree that consensual surveillance implicates very different issues than does non-consensual monitoring. Unlike the latter, consensual surveillance "does not concern the question of privacy as much as it does the question of trust in a society," said Professor Schwartz.

"People say an awful lot of things casually, sloppily, jokingly," Professor Schwartz said, and with a taped conversation "the listener gets a transcript — in cold print."

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Wick file

TRB

FROM WASHINGTON

HOLY MACKEREL, SAFIRE

That lumbering beast, the Washington scandal, is awake again and growling to be fed. Dinner—trembling and cowering and looking very tasty—is to be Charles Z. Wick, head of the United States Information Agency. Flogging the beast vigorously to keep it enraged and hungry is William Safire, conservative columnist for *The New York Times*.

Someone leaked Safire evidence that Wick had been tape-recording his phone calls. Confronted, Wick stupidly insisted that he had never recorded a conversation without telling the other party, then later admitted he sometimes had. Also stupidly, he said the taping had begun in 1983, though it went back to 1981. Newspapers have been ringing the changes on the "secret tapes" story for two weeks. A federal agency is investigating. Two Congressional committees plan hearings. One state is considering criminal charges. In a particularly ominous development, President Reagan has expressed his full support for Wick. All this is standard operating procedure. Meanwhile, Safire hints darkly of more revelations to come.

Wick was wrong to tape his phone calls, and wrong to lie. But the almighty fuss is way out of proportion, and its self-feeding momentum is downright frightening. Safire's motive in branding this vain and silly man as the Wicked Wick of the West is, at best, mysterious.

By all accounts, Wick is a jackass. One of Reagan's California socialite buddies, he's been a repeated embarrassment to his chum. He spent $32,000 on a security system for his rented house, believing himself Washington's second most likely target of a terrorist attack. In the so-called "kiddygate" episode, he gave jobs to children of Administration members and friends, including Alexander Haig, Caspar Weinberger, and William Clark. More recently, he blurted his view that British Prime Minister Thatcher only opposed the American invasion of Grenada because "she's a woman."

Employees and former employees describe Wick as a petty dictator in two senses: first, as a maniacal boss given to comic swaggering and lunatic rages; second, as a man with a dictaphone for a right arm, who likes to record his every passing thought and conversation and then have secretaries type up transcripts. His taping was not "secret" in the sense that he made any attempt to hide the practice. (It's wonderful how many people now recall having warned Wick that the taping was a bad idea.) There's no reason to doubt Wick's assertion that when he failed to alert people to the taping, it was an oversight.

There's a fundamental difference between taping your own conversation and bugging a conversation you're not a party to. The people talking to Wick knew he was listening and knew he could repeat what he heard. Nevertheless, surreptitious taping is a violation of confidence, though Safire's assertion that victims of secret tapes "are left with the feeling of the aborigine who fears that a picture taken of him steals his soul" is a bit theatrical. Richard Cohen of *The Washington Post* is closer to the mark when he argues that what taping steals from you is deniability. When it's on tape, "You can't lie."

If what's at stake here is freedom to lie (not a trivial freedom), maybe we need a bit of perspective on Wick's second transgression: lying when confronted. Imagine how easy it is to panic when William Safire drops by to announce that he's got you by the private parts and is planning to squeeze in the next morning's *New York Times*. Even lesser journalists can have the same effect. For example, I called up Gilbert Robinson last week to ask if he had leaked Wick's transcripts to Safire. Gilbert Robinson was deputy director of U.S.I.A. until last May, when Wick made him the fall guy for "kiddygate" and fired him. He's also an old friend of William Safire. In 1959, they helped organize the famous "kitchen debate"

continued on page 42

TRB, *from page 4*

between Richard Nixon and Nikita Khrushchev at the U.S. exhibition in Moscow. (Robinson worked for the Eisenhower Administration. Safire represented the kitchen equipment manufacturer.) Later, they were partners in a public relations business.

When I said to Robinson, "You're aware that people are saying you're the leaker," he replied: "I was not aware, but it's not the case." Later, forgetting he'd said he wasn't even aware of these rumors, he complained of the burden of unjust suspicion: "I have friends who came up to me the first day and said, 'Ha ha ha'—they knew it was me. . . ." So Safire's friend Gilbert Robinson panicked and told me a fib.

The greatest sinner in this episode, though, is neither Wick nor Robinson but William Safire. Safire writes, "Secret taping is wrong—unethical—because it erodes trust and engenders suspicion, thereby reducing human communication." True enough. But all Wick did was to record these conversations for his own use. It is Safire who is publishing them in *The New York Times*.

What contributes more to an atmosphere of distrust and paranoia: the possibility that conversations may be taped by people who are already privy to them, or the possibility that confidential information—taped or otherwise—will be leaked to the newspapers? Yet when it comes to leaks, Safire expresses less than zero concern about eroding trust and engendering suspicion. In a column on December 18, the week before the Wick circus began, he invited federal employees to mail "evidence of . . . surreptitious taping to their local right-wing columnist," meaning him. After the story broke, he bragged about his "help-wanted ad" and predicted with glee that the leaker(s) "are surely not finished yet." The process Safire has set in motion guarantees that all of Wick's transcripts will be distributed to various investigating bodies, where many more of them will become public.

And if an angel dies every time a lie is told, you can be sure that Safire's source, whoever that may be, has killed more angels over the past few weeks than Charlie Wick killed in his feeble cover-up attempt. Or does lying to cover up leaking not count?

Safire subscribes to an "invisible hand" theory of leaks. "The proper way" to maintain confidentiality, he writes, "is to stop the leak at the source. That requires the people at the top to keep their mouths shut when secrecy serves the public interest." Once leaked upon, the journalist needn't consider whether secrecy serves the public interest. It's a game: one side tries to keep people's mouths shut, the other side tries to pry them open, and an invisible hand presumably assures the right outcome.

In reality there's no such assurance. The fact of Wick's taping is a legitimate, though overplayed, news story. But if Bill Safire is so all-fired concerned about the privacy of people Wick talked to on the telephone, what public interest is served by publishing these conversations? Here the story gets ugly. Safire has been implying that the transcripts reveal serious misconduct, apart from the taping, although the transcripts he's published so far (I write on January 10) reveal nothing even suspicious.

The published transcripts concern a meeting Wick wanted to arrange between President Reagan and several media executives. Wick was hoping to raise private money in conjunction with "Project Democracy," an Administration program to promote democratic values around the world. Wick mentioned in a phone call to White House Chief of Staff James A. Baker that the meeting might also be useful to Reagan's reelection: "if you are interested in '84 in addition to doing what we are trying to do, can you imagine a better group of guys?" Wick signed off, idiotically, "We will win in '84." ("Mr. Baker: 'Goodbye.' ") In another conversation with an aide, Wick referred to having raised "other money."

From these sparse threads, Safire spins a web of innuendo. "What 'other money'?" he leers. "Transcripts . . . show he was planning to raise large sums from foreign and domestic media fatcats, using as bait a personal audience in the White House." Safire speculates about "some top-secret purpose . . . in connection with 'Project Democracy.' " And he charges that "the President's crony gathered the media bigwigs with Mr. Reagan's 1984 campaign clearly in mind."

So what? In a column back in January 1983, Safire had high praise for Project Democracy (with a special tribute to his pal, Gilbert Robinson). If he now thinks there's something wrong with raising private funds to serve this goal, he hasn't said what it is. And if he suspects that Wick actually was raising money for some other "top-secret" purpose, he hasn't said why. Does Safire seriously think it's heinous to flatter useful people by inviting them to the White House? Or for a Presidential aide to think about politics as well as policy? If he does, he should say so, and suffer the apposite guffaws. As for the ominous "other money," Safire knows perfectly well that Wick has raised money for a variety of legitimate purposes, including the Reagan inauguration.

And yet, Safire's apparently baseless innuendos have now spread. *The Washington Post* has editorialized about "cryptic but eyebrow-raising references to raising political money." Syndicated columnist Mary McGrory called the Baker transcript "a murky but potentially explosive exchange" which "suggests that Wick may have confused his 'mission' of telling the truth about America with a mission to reelect Ronald Reagan."

Maybe these people know something I don't. One theory around town is that Safire has got other goods on Wick and is dribbling out the evidence Chinese-water-torture-style for better effect. Or, a related theory, he suspects further wrongdoing and hopes, by keeping the heat on, to smoke out some solid evidence. Neither theory flatters Safire's self-image as a demon for fair play and individual rights. Nor, of course, does the theory that Safire is avenging his shafted crony (a Safire word).

A more flattering theory is that Safire has never lost his sense of outrage at having been one of the Nixon aides whose phones were tapped at the request of Henry Kissinger. Perhaps. But Safire's outrage did not prevent him from attending Kissinger's gala sixtieth birthday party a while back. If Safire is really still mad about being bugged, why is he partying with the bugger and persecuting a man who only bugged himself?

My own theory is that Safire is simply a good P.R. man. He knows how to hype a story and keep it hyped. He knows it's good for his image to keep people guessing by attacking the Republican Administration every now and then. An apparent obsession with civil liberties also puts a nice spin on the ball. But whatever his motive, he is misusing the power of his august office as a columnist for the nation's leading newspaper. He's behaving, not like a civil libertarian, but like a bully.

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NONCONSENSUAL RECORDING OF CERTAIN TELEPHONE CONVERSATIONS BY USIA DIRECTOR CHARLES Z. WICK

A STAFF REPORT

PREPARED FOR THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

FEBRUARY 1984

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LETTER OF TRANSMITTAL

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C., January 27, 1984.

Hon. CHARLES H. PERCY, *Chairman,*
Hon. CLAIBORNE PELL, *Ranking Member,*
Committee on Foreign Relations, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN AND SENATOR PELL: At your instruction we have reviewed the recording practices of USIA Director Charles Z. Wick. Herewith we report our findings.

CHARLES M. BERK,
BARRY SKLAR,
Professional Staff Members.

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EXECUTIVE SUMMARY

Background

The New York Times reported on December 28, 1983 that Charles Z. Wick, the Director of USIA, had secretly tape-recorded his telephone conversations without the consent of the parties with whom he was speaking. According to the article, Mr. Wick denied that he had engaged in such a practice. (See Section 1 infra and Appendix 1 to this Report.) Subsequent to the publication of this article, increasing public attention was focused on Mr. Wick's alleged secret recording of his telephone conversations. Pursuant to requests by both the Committee on Foreign Relations and the Committee on Foreign Affairs of the House of Representatives, USIA staff assembled all materials believed to be related to Mr. Wick's recording of his telephone conversations. These materials were provided to both Committees on January 9, 1984.

Later that day, Committee staff interviewed Mr. Wick at which time he also issued a public statement regarding this matter. In that statement Mr. Wick acknowledged tape recording some of his telephone conversations without the consent of the persons with whom he was speaking. He said that his purpose "was always to extend the reach" of his memory, "never to threaten or humiliate others." He apologized to anyone he harmed and said that he now understood that "taping of others without their consent is unfair, invades their privacy, and can lead to other more dangerous practices."

On that same day, a fact sheet was also released by USIA which stated that 81 transcripts and 4 cassettes of telephone conversations recorded by Mr. Wick were being made available to the Foreign Relations and Foreign Affairs Committees. The statement indicated that the transcripts were of conversations recorded between July 8, 1981 and September 6, 1983 and that 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. According to the fact sheet, the practice of recording such conversations has been discontinued. The fact sheet further noted that the Agency had made available to the Committees transcriptions of stenographic notes taken by the Director's secretaries while he was speaking on the telephone. The notes provided to the Committees covered the period from May 27, 1982 to December 23, 1983 and concern 83 telephone conversations. The fact sheet states that the practice of taking such stenographic notes without notice to the other party has also been discontinued. (See Appendix 4.)

Particular Matters Reviewed by Committee Staff

A. When did Mr. Wick begin tape-recording his telephone conversations without the consent of parties with whom he was speaking? Where did such taping take place? Why was it done? Why and when did it stop?

Mr. Wick began tape-recording some of his telephone conversations without the consent of the parties with whom he was speaking shortly after his arrival at USIA in March 1981 as the Director-designate. He more frequently did not ask for consent to tape-record than he did ask for such consent. However, the total number of telephone conversations tape-recorded was probably only a small percentage of the Director's calls. Mr. Wick tape-recorded the great majority of his telephone conversations in his office at USIA although it appears that he also recorded conversations in Florida and California without the consent of the parties with whom he was speaking. Mr. Wick also indicated to Committee staff that he had tape-recorded some telephone conversations while traveling abroad on USIA business.

Telephone conversations were recorded by the Director so that he could follow-up appropriately on suggestions or comments made to him during the course of these conversations. There is no evidence to suggest that Mr. Wick had any illegal or malicious motive in making nonconsensual tapes and transcriptions.

In July 1983, Mr. Wick instructed his staff to remove the telephone recording attachment to his desk model Dictaphone because of his increasing concern that USIA employees might misinterpret his motives in tape-recording telephone conversations. Despite the removal of this taping attachment, Mr. Wick continued sporadically to make nonconsensual tape-recordings of his telephone conversations through December 1983.

B. When did Mr. Wick first instruct his secretarial staff to take simultaneous notes of his telephone conversations without the consent of the parties with whom he was speaking? Where did such notetaking take place? Why was it done? Why and when did it stop?

While he was Director-designate, Mr. Wick instructed his secretaries to listen-in on another telephone line during some of his telephone conversations and to take notes of these conversations. When notetaking did occur in the Director's office, in most cases the person speaking with the Director did not know that such notes were being taken of the conversation.

As was the case with his nonconsensual tape-recording of telephone conversations, it appears that the nonconsensual notetaking of the Director's telephone conversations occurred primarily in his USIA office. No information has been obtained by Committee staff to indicate that nonconsensual notetaking occurred outside of the District of Columbia or while Mr. Wick traveled abroad.

The purpose for such notetaking appears to have been identical to that of tape-recording conversations. As with the telephone conversations, the committee staff has discovered no information indicating that Mr. Wick instructed his staff to take such notes for any illegal or malicious purpose. Simply put, such notes were viewed by the Director and his staff as an office management aid.

Based upon Committee staff interviews with Mr. Wick and knowledgeable USIA employees, it appears that such notetaking, both with and without consent, continued up until Mr. Wick was interviewed in his home by William Safire and Jane Perlez of the New York Times on December 26, 1983.

C. What uses were made of the transcriptions of tapes and notes that Mr. Wick accumulated? Who had access to these materials?

It appears that the transcriptions of the Director's tapes and notes were used as a management tool to ensure appropriate follow-up on any "action items" and other matters of concern to the Director.

In one instance, a transcription of a taped conversation of the Director with former President Carter was recast as a memorandum of conversation, circulated by the Director to other USIA officials, and then forwarded to President Reagan. The memorandum of conversation did not indicate that it had been prepared from a verbatim transcript of a nonconsensual tape-recorded conversation.

It was widely known among the Director's staff that he recorded some of his telephone conversations. At various times, most of the Director's assistants and secretaries reviewed the transcripts and notes of these conversations. In addition, employees in the office of the Deputy Director, including the Deputy Director, frequently had access to such notes and transcripts. However, it appears that such notes and transcripts only would have been distributed outside the offices of the Director and Deputy Director if a specific issue raised in a note or transcript required the attention of a USIA employee in another office.

D. Were the raw tapes and notes retained after they were transcribed?

It had been Mr. Wick's practice to erase the tapes after they were used. Transcriptions of the Director's telephone conversations would be discarded routinely unless they became a part of the Director's "daily notes" that were distributed to the staff. A master set of the "daily notes" was retained in the Director's office.

The surviving transcripts and notes of the Director's telephone conversations became a part of those "daily notes" which were not discarded. However, it also appears that most of the Director's transcripts and notes of his telephone conversations did not become a part of the "daily notes" and were, therefore, routinely destroyed.

E. Was Mr. Wick aware of the laws and regulations governing the nonconsensual tape-recording of telephone conversations when he engaged in such activities? If so, when did he become aware of such laws and regulations?

At least two USIA employees discussed the propriety of Mr. Wick's tape-recording practices with him during 1981.

It appears that either during November 1981 or the first half of December 1981 Mr. Wick asked for an opinion from USIA officials on the appropriate procedures to be followed when tape-recording telephone conversations. A memorandum dated December 17, 1981, on this subject was prepared by the USIA General Counsel. (See Appendix 5.) The memorandum in its summary heading states "the Director may record and transcribe telephone conversations if prior

consent is obtained from all parties for each conversation. All consents should be recorded and transcribed." A copy of the relevant GSA regulations covering recording of the telephone conversations was attached to the memorandum. These regulations make it clear that tape-recording of telephone conversations should only be performed with the consent of all parties for each specific instance of recording.

According to Mr. Wick, since the GSA regulations did not establish sanctions if breached, he felt there were no legal obstacles to prevent him from tape-recording conversations without consent. In his view, since such recording was not illegal, it was permissible.

Mr. Wick told Committee staff that when he tape-recorded telephone conversations without consent in Florida and possibly without consent in California, he was not aware that he may have violated the laws of either Florida, California, or both States. (See Appendix 3 for applicable laws and ABA Code of Professional Responsibility.) He also was not aware that the ABA Committee on Ethics and Professional Responsibility had condemned nonconsensual tape-recording of telephone conversations.

F. Was Mr. Wick aware that nonconsensual recording of telephone conversations could be considered inappropriate behavior for a person in a position of public trust? If so, how was he made aware of this concern, and what was his response to the advice he received?

When Mr. Wick, first began tape-recording telephone conversations as the USIA Director-designate, he was instructed by representatives of the Dictaphone Company that he should not tape-record telephone conversations without the consent of the persons with whom he was speaking. He had also been cautioned about such taping in 1981 by two Agency employees. As noted in subsection E, on or about December 17, 1981, Mr. Wick became aware of the Federal requirements with respect to the tape-recording of telephone conversations.

Subsequent to the issuance of the December 17, 1981 memorandum, at least two, and possibly, three members of Mr. Wick's personal staff told him that they disliked his tape-recording practices and were concerned that the motive behind such tape-recording and transcribing of tapes might later be misconstrued.

Thus, while it appears that the Director's objectives in recording his telephone conversations were honorable, by his own admission his methods were not. He was insensitive to concerns of his staff and legal counsel that nonconsensual recording was at best a practice of questionable value.

G. Do the New York Times article of December 28, 1983 concerning Mr. Wick's nonconsensual recording of telephone conversations and William Safire's column of December 29, 1983 in the New York Times on this matter accurately reflect Mr. Wick's initial statements to the press about his recording practices? Is there any credible evidence that Mr. Wick or any USIA officials misled or attempted to mislead the press in reporting on Mr. Wick's recording practices?

The December 28, 1983 New York Times account of Mr. Wick's recording practices states that Mr. Wick "denied that he had taped telephone calls surreptitiously, saying he had always informed the other party when a conversation was being recorded." In his interview with Committee staff, Mr. Wick stated that he did meet with William Safire and Jane Perlez of the New York Times on December 26, 1983 in his Washington, D.C. home. According to Mr. Wick, shortly after Mr. Safire and Ms. Perlez entered his home, Mr. Safire asked him if he had surreptitiously tape-recorded his telephone conversations. Mr. Wick said that he was "startled, confused, and had no chance to consider the stuff" about which Mr. Safire was questioning him. According to Mr. Wick, he told Mr. Safire that there might be some few instances when he didn't ask for consent to tape telephone conversations.

Mr. Wick stated that he denied surreptitiously tape-recording his telephone conversations with the persons cited by Mr. Safire and Ms. Perlez. Mr. Wick recalled that he made the denial as he was showing Mr. Safire and Ms. Perlez to the door. He described his denial as "an involuntary response," in saying "no, no, no." Mr. Wick told Committee staff that he did not recall at that time whether he had tape-recorded telephone conversations with the people named by Mr. Safire and Ms. Perlez and that he would have been better off not to have made any comments about this to Mr. Safire or Ms. Perlez.

Based upon Committee staff interviews with USIA employees involved in determining the period of time during which Mr. Wick recorded telephone conversations without consent, it is clear that the initial reporting on this matter by USIA officials was inaccurate and at times contradictory. It also appears, however, that such inaccuracies as were reported occurred because of miscommunication among USIA staff and not because of any effort by the Director or USIA officials to mislead the press or to cover up the Director's recording practices.

H. Is there any credible reason to believe that materials requested by the Committee on Foreign Relations or pursuant to the Safire FOIA request of December 26, 1983, have been withheld from the Committee or have been altered or destroyed?

Every person interviewed by Committee staff who may have had any contact with the materials requested by the Foreign Relations Committee and by William Safire was asked whether such materials have been destroyed, altered, or withheld, or whether any person has been instructed to destroy, withhold, or alter any such materials. The respondents, without exception, stated that they knew of no such actions. To the contrary, the persons who collected the materials were instructed not to tamper with them in any fashion. (See Appendix 6 for letter of USIA General Counsel, dated January 20, 1984 concerning provision of materials to the SFRC.)

I. Do the materials provided on January 9, 1984 by the USIA to the Committee on Foreign Relations reveal any evidence of illegal conduct by Charles Wick?

It is clear that the Director violated the applicable GSA regulations brought to his attention on or about December 17, 1981.[1] It

[1] On January 23, 1984, the GSA issued its findings and recommendations with respect to Mr. Wick's recording practices. (See Appendix 7 to this report for GSA findings and recommendations.) Further, the Archivist of the United States is now reviewing USIA's compliance with Federal regulations pertaining to records maintenance. The USIA General Counsel maintains that USIA records have been retained and disposed of in accordance with GSA guidelines.

should be noted, however, that these GSA regulations are considered "preferred management practices" rather than regulations that carry sanctions under law or administrative practice such as those promulgated by the EPA, SEC, or FTC.

Based upon the Committee staff review of the materials provided to it by the USIA, it has been determined that Mr. Wick tape-recorded telephone calls while in the State of Florida without the consent of the parties to such calls. It should be noted that the persons with whom Mr. Wick was speaking did not appear to be located in Florida when the calls were tape-recorded. It may be a criminal offense in Florida to tape-record telephone calls without the consent of all parties to such calls.[2]

It is also possible that Mr. Wick tape-recorded a telephone conversation while he was in the State of California, speaking with a person located in the State of California. It further appears that this conversation was tape-recorded without the consent of the person speaking with Mr. Wick. It may be a criminal offense in California to tape-record telephone conversations without the consent of all parties to such calls.

It does not appear that the applicable Federal law, 18 USC, Section 2511(2)(d), has been violated since there is no credible evidence to indicate that Mr. Wick recorded telephone conversations for the purpose of committing "any criminal or tortious act in violation of the Constitution or the laws of the United States or of any State or for the purpose of committing any other injurious act."

[2] It was reported in The New York Times on January 25, 1984 that the State Attorney for Palm Beach County, Florida had decided not to initiate any legal action against Mr. Wick because when the totality of the circumstances are considered, "it doesn't warrant further action." He noted however that "if he was in the State of Florida when the calls were made, then our statute applies."

STAFF REVIEW OF NONCONSENSUAL RECORDING OF CERTAIN TELEPHONE CONVERSATIONS BY USIA DIRECTOR CHARLES Z. WICK*

Section 1. Basis for the Staff Review

On December 28, 1983, The New York Times published an article entitled "USIA Director Acknowledges Taping Telephone Calls in Secret". This article asserted that Charles Z. Wick, Director of the United States Information Agency, had "secretly tape-recorded his office telephone conversations with Government officials, his staff and friends, according to his aides and to transcripts of the conversations." The article stated that when interviewed the preceding Monday, December 26, Mr. Wick denied that he had taped his telephone conversations without the consent of all parties to such conversations. However, according to the story, the next day Mr. Wick telephoned a statement to the newspaper saying that starting in January of this year (1983), he had recorded "a small percentage" of his telephone conversations without informing the other parties to such conversations. The article stated that the newspaper had obtained transcripts of some of the Director's telephone conversations and that these conversations occurred during 1982. Some of the transcripts of these conversations were read to the callers who remembered the conversations but said that they had not been told by Mr. Wick that they were being tape-recorded. The article provided additional details about persons allegedly taped; Mr. Wick's comments on such taping; as well as a brief discussion of relevant State and Federal laws on nonconsensual recording of telephone conversations. (See Appendix 1 for New York Times article, dated December 28, 1983.)

Subsequent news stories reported additional information about the Director's recording practices as well as when such recording occurred. A New York Times story dated January 4, 1984 included an excerpt of a transcript of a telephone conversation on March 31, 1983 between Mr. Wick and James Baker, White House Chief of Staff, concerning arrangements for a meeting at the White House involving the President and a group of publishers and businessmen. According to the article, Mr. Baker stated that he had not been informed by the Director that this conversation had been recorded. Further, it was asserted that the telephone call had been recorded while Mr. Wick was in Palm Beach, Florida where such recording may be unlawful.[1]

*Except where noted otherwise, recording shall be deemed to include both tape recording and notetaking by third parties.

[1] Florida law provides that nonconsensual recording of telephone conversations may be a felony punishable by a maximum prison term of 5 years and a $5,000 fine. However, it is un-

Continued

Because of widespread concerns about such nonconsensual recording by the USIA Director, Senators Percy and Pell instructed Committee staff to review this matter so that Committee members could assess both the legality and propriety of the Director's actions.

In the Senate, the Committee on Foreign Relations has primary oversight responsibility for the United States Information Agency. The Committee authorizes the Agency's budget and also considers the qualifications of those persons nominated by the President to serve at USIA. This, of course, includes the current Director of USIA, Charles Wick, who was nominated for that position on April 14, 1981. Mr. Wick's nomination was reported favorably by the Committee to the Senate on May 6, 1981, and he was confirmed by the full Senate on June 8, 1981.

Section 2. Nature and Scope of the Review

The Committee staff conducted this review by gathering information that may relate to assertions of potentially improper and/or illegal actions by the USIA Director. The staff has not conducted an investigation aimed at determining whether or not Mr. Wick violated state or Federal laws but has attempted to establish whether possible violations of such laws occurred. Further, the staff did not focus on the programs or policies of USIA but did consider such programs and policies if they pertained to the Director's recording practices.

Committee staff has reviewed the recording activities of the Director from March of 1981 when he first arrived at USIA up to the present. In reviewing the Director's activities, Committee staff requested from USIA all existing notes, tapes, and transcriptions of the Director's telephone conversations. This material has been reviewed to assess whether the Director may have violated any State laws, Federal laws or regulations, or applicable codes of behavior that concern nonconsensual recording of telephone conversations.

Section 3. Methodology

The Committee staff requested from USIA "all materials related to or generated by your (Charles Z. Wick) recording and transcription of the conversations at issue." (See Appendix 2—Chairman's letter of January 4, 1984 to Charles Z. Wick.) Subsequently, on January 9, 1984, the Committee staff received from USIA the notes of 83 of the Director's telephone conversations and 81 transcripts of the Director's telephone conversations. One memorandum of conversation was provided to the Committee staff as were four cassette tapes of the Director's telephone conversations.[2] Committee staff also reviewed at USIA six 3-ring binder books of stenographic notes

clear whether the Florida law applies to interstate calls. It is not a criminal offense in the District of Columbia for one party to record telephone conversations without the consent of another party and may only be a criminal offense under Federal law if done "for the purpose of committing any criminal or tortious act in violation of the Constitution or the laws of the United States or of any State, or for the purpose of committing any other injurious act." (Title 18, United States Code, Section 2511(d)).

[2] These materials have been retained by the Committee staff under secure conditions to ensure, to the maximum extent possible, that the right to privacy of persons recorded by the Director is maintained.

of Mr. Wick's telephone conversations and his instructions to staff. An additional three transcripts and notes of the Director's telephone conversations were located at USIA on Jaunary 17, 1984, and upon their discovery were made available to Committee staff for review.

Committee staff has conducted 22 confidential interviews with current and former employees of USIA. The purpose of such interviews was to gather information concerning the practices and motivations of the Director and his staff in recording his telephone conversations. The memoranda of these interviews have been retained by Committee staff.

The Committee staff has reviewed the relevant State and Federal laws as they pertain to nonconsensual recording of telephone conversations, applicable Federal regulations governing such activities, and relevant codes of behavior that touch upon this subject. (See Appendix 3 for copies of these items.)

Section 4. Brief Background

On December 28, 1983, it was reported in the New York Times that Charles Z. Wick, the Director of USIA had secretly tape-recorded his telephone conversations without the consent of the parties with whom he was speaking. According to the article, Mr. Wick denied that he had engaged in such a practice. (See Section 1 supra and Appendix 1 to this Report.) Subsequent to the publication of this article, increasing public attention was focused on Mr. Wick's alleged secret recording of his telephone conversations. Pursuant to requests by both the Committee on Foreign Relations and the Committee on Foreign Affairs of the House of Representatives, USIA staff assembled all materials believed to be related to Mr. Wick's recording of his telephone conversations. These materials were provided to both Committees on January 9, 1984. On that same day, Committee staff interviewed Mr. Wick at which time he also issued a public statement regarding this matter. That statement read in part:

> "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 humilate others. But it has become quite clear to me that in trying to be meticulous in 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 recol-

lection. 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 wrong doing." (See Appendix 4 for complete text of January 9 statement and other formal statements issued by the Director.)

On that same day, a fact sheet was also released by USIA which stated that 81 transcripts and 4 cassettes of telephone conversations recorded by Mr. Wick were being made available to the Foreign Relations and Foreign Affairs Committee. The statement indicated that the transcripts were of telephone conversations recorded between July 8, 1981 and September 6, 1983 and that 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. According to the fact sheet, the practice of recording such conversations has been discontinued. The fact sheet further noted that the Agency had made available to the Committees transcriptions of stenographic notes taken by the Director's secretaries while he was speaking on the telephone. The notes provided to the Committees covered the period from May 27, 1982 to December 23, 1983 and concern 83 telephone conversations. The fact sheet states that the practice of taking such stenographic notes without notice to the other party has also been discontinued. (See Appendix 4.)

As a result of the Committee staff review, it can now be assumed that Charles Z. Wick did: (1) tape-record a portion of his telephone conversations without the consent or knowledge of the parties with whom he was speaking and (2) instruct his secretaries to take notes of a portion of his telephone conversations without the consent or knowledge of the parties with whom he was speaking. It will also be assumed that both non-consensual practices have been discontinued.

Section 5. Particular Matters Reviewed by Committee Staff

A. When did Mr. Wick begin tape-recording his telephone conversations without the consent of parties with whom he was speaking? Where did such taping take place? Why was it done? Why and when did it stop?

Mr. Wick stated to Committee staff that he began tape-recording his telephone conversations when he first came to USIA in March of 1981 as the Director-designate. Initially, he used a desk model Dictaphone to tape-record telephone conversations broadcast from the loudspeaker attachment to his telephone. He also tape-recorded telephone conversations using a hand-held Dictaphone which had a special attachment that could be placed near or on the receiving unit of a telephone to record conversations. It has been confirmed to Committee staff by two other individuals who worked with Mr. Wick during 1981 that he tape-recorded telephone conversations prior to 1982.

Mr. Wick has issued public statements and has also stated to Committee staff that when he tape-recorded telephone conversations, he more frequently did not ask for consent to tape-record than he did ask for consent to tape record. He estimated, however, that he tape-recorded telephone conversations infrequently when compared to the total number of telephone calls he handled as the Director-designate and as the Director of USIA.[3] Four present and former USIA employees who had frequent opportunities to observe Mr. Wick taping telephone conversations expressed the belief that he taped conversations both with and without the consent of the parties with whom he was speaking. These individuals could not confirm to staff that Mr. Wick more frequently did not ask for consent to tape-record than he did ask for consent to tape-record such conversations.

Mr. Wick tape-recorded the great majority of his telephone conversations in his office at USIA. Mr. Wick did acknowledge that on March 21, 1983 he tape-recorded some of his telephone conversations without the consent of the parties with whom he was speaking while in Palm Beach, Florida. He stated that, other than in the District of Columbia, he does not recall tape-recording any other telephone conversations in the United States. Mr. Wick did tell Committee staff that he had tape-recorded some telephone conversations while traveling abroad on USIA business.

A review of the notes of transcripts of telephone conversations provided to the Committee by USIA confirms that Mr. Wick recorded six telephone conversation while in Florida on or about March 21, 1983. In addition, it is possible that on or about July 8, 1981, Mr. Wick tape-recorded a telephone conversations while in California with an individual located in California who had not consented to such tape-recording. Mr. Wick does not recall specifically having tape-recorded any telephone conversations while in California, but after reviewing the transcript in question with Committee staff he indicated that it did appear that he had tape-recorded a conversation while in California without the other party's consent. He stated that if he had tape-recorded this conversation, he would have used his hand-held Dictaphone to do so. Mr. Wick also noted that the document he reviewed with Committee staff appeared to be an actual transcript of the conversation and was not a reconstructed memorandum of conversation. Staff interviews with present and former USIA officials have developed no other information indicating that Mr. Wick tape-recorded telephone conversations in locations other than those cited above.

Mr. Wick told the Committee staff that he tape-recorded his telephone conversation so that he could "do a better job as the Director." He wanted to be efficient and to follow-up appropriately on suggestions or comments made to him during the course of these conversations. Current and former USIA employees have confirmed to Committee staff that parts of or the entire transcripts of such telephone conversations routinely would be passed to appropriate staff in the Director's office to follow-up on any "action items." All present and former USIA employees interviewed by Committee staff echoed the same theme: the Director was obsessed with detail and follow through. He would dictate volumes of notes

[3] Mr. Wick estimates that he has handled between 7,500–10,000 telephone calls since March 1981. He also noted that less than 200 notes and transcripts of conversation now remain and that this accounts for no more than 2 percent of his telephone conversations. This does not mean, however, that he only recorded 2 percent of his conversations. Committee staff believes that the number of conversations recorded was at least 250 and probably exceeded 300.

to his staff on items requiring further action or ideas he wished to be developed. Likewise, transcripts of his telephone conversations were also treated as action items.

Mr. Wick stated that he had no illegal or malicious motive in making nonconsensual tapes and transcriptions. His present and former staff confirmed Mr. Wick's statement and in the course of this review, no information has been developed to indicate otherwise.

In July 1983, Mr. Wick instructed his staff to disconnect and remove the telephone recording attachment to his desk model Dictaphone. He asserted that he did so because of his increasing concern that USIA employees might misinterpret his motives in tape-recording telephone conversations. Members of the Director's personal staff confirmed that they had expressed their concerns to him prior to the removal of the desk model Dictaphone attachment. Further, one of Mr. Wick's assistants stated that he had a "dim recollection" of Mr. Wick meeting with him and other staff to discuss the removal of the taping attachment.

Despite the removal of the taping attachment to his desk model Dictaphone, Mr. Wick continued to make nonconsensual tape-recordings of some of his telephone conversations through December 1983, using his hand-held Dictaphone. Mr. Wick told Committee staff that he continued "on a sporadic basis" to tape-record telephone conversations when he needed a precise understanding of details that he might otherwise forget or misinterpret. It should be noted that the materials provided to Committee staff by USIA confirm that Mr. Wick did continue making nonconsensual tape-recordings of telephone conversations after the desk model Dictaphone attachment was removed from his office in July of 1983.

B. When did Mr. Wick first instruct his secretarial staff to take simultaneous notes of his telephone conversations without the consent of the parties with whom he was speaking? Where did such notetaking take place? Why was it done? Why and when did it stop?

Mr. Wick stated to Committee staff that while he was Director-designate he instructed his secretaries to listen-in on another telephone line during some of his telephone conversations and to take notes of these conversations. Mr. Wick further stated that in some instances this notetaking by his secretaries was done with the knowledge of the party with whom he was speaking and in some instances it was done without their knowledge.

One person in a position during 1981 to observe the Director's actions closely, confirmed Mr. Wick's recollection of his instructions to the secretarial staff. However, one of the secretaries who worked closely with Mr. Wick during the preconfirmation period stated that she does not recall ever taking notes of telephone conversations for the Director.

As was the case with his nonconsensual tape-recording of telephone conversations, it appears that the nonconsensual notetaking of the Director's telephone conversations occurred primarily in his USIA office. No information has been obtained by Committee staff to indicate that nonconsensual notetaking occurred while Mr. Wick traveled abroad or outside of the District of Columbia. It has been confirmed to staff, however, that when notetaking did occur in the

Director's office, in most cases the person speaking with the Director did not know that such notes were being taken of the conversation. Furthermore, the person in the Director's office primarily responsible for taking such notes is certain that it was much more common for Mr. Wick to instruct his secretaries to take notes of telephone conversations than for him to tape-record such conversations.

The purpose for such notetaking appears to have been identical to that of tape-recording conversations according to the Director and other persons interviewed by Committee staff. Notes of conversation were taken, transcribed, and distributed to staff for follow-up and appropriate action and to insure that the Director had an accurate recollection of matters discussed in such conversations. As with the telephone conversations, the Committee staff has discovered no information indicating that Mr. Wick instructed his staff to take such notes for any illegal or malicious purpose. Rather, such notes were viewed by the Director and his staff as an office management aid.

Based upon Committee staff interviews with Mr. Wick and knowledgeable USIA employees, it appears that such notetaking, both with and without consent, continued up until Mr. Wick was interviewed in his home by William Safire and Jane Perlez of the New York Times on December 26, 1983. The notes of conversations provided to the Committee staff by USIA indicate that these notes were retained by the Director's office up until December 23, 1983. It is the belief of Committee staff that such notetaking was discontinued because it had become a matter of controversy due to the publication of the New York Times article on December 28, 1983.

C. What uses were made of the transcriptions of tapes and notes that Mr. Wick accumulated? Who had access to these materials?

Based upon Committee staff interviews with the Director's current and former staff and with the Director, it appears that the transcriptions of the Director's tapes and notes were used as a management tool to insure appropriate follow-up on any "action items" and other matters of concern to the Director. Mr. Wick regularly dictated his thoughts and ideas about USIA i.e., the "daily notes of the Director," which were transcribed and distributed to his staff. Likewise, the transcriptions of the tapes and notes of his telephone conversations were distributed to staff. Oftentimes the transcriptions and notes of telephone conversations were mixed in with the "daily notes."

The Committee staff has found no evidence that such notes and/or transcriptions were used for any purposes other than those described in Sections 5 (a) and (b). However, in one instance, it has been determined that a transcription of a taped conversation of the Director with former President Carter was recast as a memorandum of conversation. This memorandum was circulated by the Director to other USIA officials and was also forwarded to President Reagan. The memorandum of conversation did not indicate that it has been prepared from a verbatim transcript of a nonconsensual tape-recorded conversation. It has been reported by one source to Committee staff that on three or four other occasions such memoranda of conversations from verbatim transcripts had been pre-

pared by the Director. However, the Committee staff has been unable to confirm this practice with any other present or former USIA employees. The Director does not recall having instructed his staff to create such memoranda of conversations except in the one instance described above.

It was widely known among the Director's staff that he recorded some of his telephone conversations. At various times, most of the Director's assistants and secretaries reviewed the transcripts and notes of these conversations. In addition, employees in the office of the Deputy Director, including the Deputy Director, frequently had access to such notes and transcripts. However, it appears that such notes and transcripts only would have been distributed outside the offices of the Director and Deputy Director if a specific issue raised in a note or transcript required the attention of a USIA employee in another office. In only one instance has it been established that a document generated by the Director's nonconsensual recording of a telephone conversation was distributed outside the agency. That one instance, already noted, involved the Director's memorandum of conversation with former President Carter.

D. Were the raw tapes and notes retained after they were transcribed?

Mr. Wick told Committee staff that it had been his practice to erase the tapes after they were used and to discard transcripts of conversations after they had been circulated to the appropriate staff person. However, not all transcripts were destroyed after they were circulated. According to the secretary with primary responsibility for transcribing the Director's dictation and telephone conversations, she would provide copies of the transcribed materials to Mr. Wick, the Deputy Director and to Mr. Wick's Executive Assistant. After distributing these materials, she would not again see the transcripts she had typed.

Members of Mr. Wick's staff confirmed that transcriptions of the Director's telephone conversations would be discarded routinely unless they became a part of the Director's "daily notes" that were distributed to the staff. A master set of the "daily notes" was retained in the Director's office. According to the Director, such notes were retained as an institutional record of his activities while Director of USIA.

According to one of the Director's assistants, approximately 1 year ago he cautioned the Director about retaining transcripts of telephone conversations which were of little importance to their work at USIA and whose purpose might later be misconstrued. At that time, he recommended to the Director that these transcriptions be retained for no more than 1 month. However, the Director did not agree with this advice so far as it concerned his "daily notes" which might include transcripts of conversations.

It is, therefore, likely that the transcripts and notes of the Director's telephone conversations reviewed by Committee staff became a part of those "daily notes" which were not discarded. However, it appears that most of the Director's transcripts and notes of his telephone conversations did not become a part of the "daily notes" and were, therefore, routinely destroyed.

E. Was Mr. Wick aware of the laws and regulations governing the non-consensual tape-recording of telephone conversations when he engaged in such activities? If so, when did he become aware of such laws and regulations?

According to one USIA employee who observed Mr. Wick tape-recording his telephone conversations, he discussed the propriety of such tape-recording with Mr. Wick during the fall of 1981. While the employee who discussed this matter with Mr. Wick had difficulty recalling the specific discussion, he believes he cautioned the Director about tape-recording telephone conversations without the consent of the people involved in such conversations. Another former employee believes that he discussed Mr. Wick's tape-recording practices with him during late 1981 or early 1982, and he recalls telling Mr. Wick that such taping was illegal. It is his recollection that Mr. Wick told him that it was not illegal to tape-record telephone conversations.

Mr. Wick confirmed to Committee staff that he had had a discussion with an Agency employee about the legality of such taping. He further stated that a "lawyer friend" advised him that it was not illegal for him to tape-record his telephone conversations in the District of Columbia.

It appears that either during November 1981, or the first half of December 1981, Mr. Wick asked for an opinion from USIA officials on the appropriate procedures to be followed when tape-recording telephone conversations. A memorandum dated December 17, 1981 on this subject was prepared by the USIA General Counsel. (See Appendix 5.) The memorandum in its summary heading states: "the Director may record and transcribe telephone conversations if prior consent is obtained from all parties for each conversation. All consents should be recorded and transcribed." The body of the one-page memorandum noted that it is legal to tape-record conversations provided that the General Services Administration regulations covering listening-in and/or recording of telephone conversations are observed. The memorandum indicated that "there is no requirement that the tapes or transcriptions be retained, but no tape or transcription may be destroyed after it is the subject of an FOIA request." A copy of the relevant GSA regulations was attached to the memorandum. These regulations make it clear that tape-recording of telephone conversations should only be performed with the consent of all parties for each specific instance of recording.

Mr. Wick was shown this memorandum by Committee staff and acknowledged that he had reviewed the memorandum at the time it was prepared for him. Mr. Wick believes that the USIA General Counsel may have also spoken to him personally about the appropriate procedures for tape-recording telephone conversations. The Director's recollection has been confirmed by the then-USIA General Counsel who specifically recalls discussing the December 17, 1981 memorandum with Mr. Wick. He told Committee staff Mr. Wick seemed to be "quite aware" of the requirements set forth in that memorandum.

Mr. Wick stated to Committee staff that he does not recall whether he reviewed the attached GSA regulations at the time he read the December 17, 1981 memorandum. He added, however, that since the GSA regulations did not establish sanctions if breached, he didn't view these regulations in a "legal or quasi-legal context"

but rather as a "businessman might measure sanctions and risks." Since there were no sanctions, Mr. Wick said he felt there were no legal obstacles to prevent him from tape-recording conversations without consent. In his view, since such recording was not illegal, it was permissible.

Mr. Wick told Committee staff that when he tape-recorded telephone conversations without consent in Florida and possibly without consent in California, he was not aware that he may have violated the laws of either Florida, California, or both States. (See Appendix 3 for applicable laws and ABA Code of Professional Responsibility.)

Mr. Wick also stated that he was not aware that nonconsensual tape-recording of conversations has been condemned by the American Bar Association, Committee on Ethics and Professional Responsibility.[4] Mr. Wick did note that he is not a practicing attorney. He is, however, a member of the Bar of California and did graduate from Western Reserve University Law School in Cleveland, Ohio. It is unclear to the Committee staff at this time whether the opinion of the ABA Ethics Committee contemplates the kind of nonconsensual tape-recording engaged in by Mr. Wick.

F. Was Mr. Wick aware that nonconsensual recording of telephone conversations could be considered inappropriate behavior for a person in a position of public trust? If so, how was he made aware of this concern, and what was his response to the advice he received?

Mr. Wick told Committee staff that when he first began tape-recording telephone conversations as the USIA Director-designate, he was instructed by representatives of the Dictaphone Company that he should not do so without the consent of the persons with whom he was speaking. As noted in subsection E, on or about December 17, 1981, Mr. Wick became aware of the Federal requirements with respect to the tape-recording of telephone conversations.

Since late 1981, it had been known widely in the Office of the Director that Mr. Wick recorded telephone conversations both with and without the consent of the parties to those conversations. It was also generally accepted by his staff that these practices were intended to improve the Director's performance and the performance of his staff in carrying out their responsibilities at USIA.

Mr. Wick told Committee staff that the December 17, 1981 memorandum made him realize that tape-recording of telephone conversations without consent was not a wise practice, but he admitted that he was insensitive to his own practices in tape-recording conversations without consent and that he should have stopped doing so.

Prior to this time, according to both a present employee of USIA and a former employee of USIA, Mr. Wick had been informed that nonconsensual tape-recording of telephone conversation is considered a controversial practice. Subsequent to the issuance of the December 17, 1981 memorandum, at least two, and possibly, three members of Mr. Wick's personal staff told him that they disliked

[4] The ABA Committee has issued a formal opinion stating that "with certain exceptions . . . no lawyer should record any conversation whether by tapes or other electronic devices without the consent or prior knowledge of all parties to the conversation.

his tape-recording practices and were concerned that the motive behind such tape-recording and transcribing of tapes might later be misconstrued. Both Mr. Wick and a member of his personal staff have stated that the primary reason that the Director instructed his staff to disconnect the telephone recording attachment to his desk model Dictaphone in July 1983 was his growing concern about the controversy that knowledge of such taping might cause.

The Director has told Committee staff that in October 1982 he tape-recorded a telephone conversation with President Carter without his consent and that this conversation was subsequently transcribed and recast as a memorandum of conversation. Mr. Wick said he considered this document quite sensitive. When asked why he considered it sensitive, he responded that it was a sensitive matter to tape-record a former President without his knowledge and that he was not proud of his behavior.

Thus, while it appears that the Director's objectives in recording his telephone conversations were honorable, by his own admission his methods were not. He was insensitive to concerns of his staff and legal counsel that nonconsensual recording was at best a practice of questionable value.

G. Do the New York Times article of December 28, 1983 concerning Mr. Wick's nonconsensual recording of telephone conversations and William Safire's column of December 29, 1983 in the New York Times on this matter accurately reflect Mr. Wick's initial statements to the press about his recording practices? Is there any credible evidence that Mr. Wick or any USIA officials misled or attempted to mislead the press in reporting on Mr. Wick's recording practices?

The December 28, 1983 New York Times account of Mr. Wick's recording practices states that Mr. Wick "denied that he had taped telephone calls surreptitiously, saying he had always informed the other party when a conversation was being recorded." The article notes that on December 27, 1983, Mr. Wick had telephoned a statement to the New York Times saying that "starting in January of this year (1983)" he recorded "a small percentage" of his telephone conversations and had not always informed the other party. Taken together these two statements by the Director appeared to conflict directly with the assertion in the New York Times that in 1982, Mr. Wick had tape-recorded some of his telephone conversations without the knowledge or consent of the callers.

William Safire wrote in his column of December 29, 1983, that when he and another reporter interviewed Mr. Wick in Mr. Wick's home on December 26, 1983 that the Director "flatly and repeatedly denied that he had been secretly taping many of his telephone conversations." In this same column, Mr. Safire questioned why Wick admitted to "secretly taping only since January 1, 1983 when transcripts now show that he was taping through March of 1982?"

In his interview with Committee staff, Mr. Wick stated that he did meet with William Safire and Jane Perlez of the New York Times on December 26, 1983 in his Washington, D.C. home. It was his belief that Mr. Safire wished to speak with him about Radio Marti. According to Mr. Wick, shortly after Mr. Safire and Ms. Perlez entered his home, Mr. Safire asked him if he had surreptitiously taped-recorded his telephone conversations. Wick said that

he was "startled, confused, and had no chance to consider the stuff" about which Mr. Safire was questioning him. According to Mr. Wick, he told Mr. Safire that there might be some few instances where he didn't ask for consent when he taped telephone conversations.

Mr. Wick remarked to Committee staff that his initial statements to Mr. Safire during this December 26 interview were not "thoughtful" and that if he had had more presence of mind he would have made no comment to Mr. Safire and Ms. Perlez on his recording practices. He added that he felt himself to be in a hostile situation. As a result, he said "certain things by trying to think fast enough about how to respond to Safire's accusations" but that he "didn't think fast enough." According to Mr. Wick, he is now "paying the consequences" for making statements he should not have made.

Mr. Wick stated that he denied surreptitiously tape-recording his telephone conversations with the persons cited by Mr. Safire and Ms. Perlez. Mr. Wick recalled that he made the denial as he was showing Mr. Safire and Ms. Perlez to the door. He described his denial as "an involuntary response" in saying "no, no, no." Mr. Wick told Committee staff that he did not recall at that time whether he had tape-recorded telephone conversations with the people named by Mr. Safire and Ms. Perlez and that he would have been better off not to have made any comments about this to Mr. Safire and Ms. Perlez.

Based upon Committee staff interviews with USIA employees involved in determining the period of time during which Mr. Wick recorded telephone conversations without consent, it is clear that the initial reporting on this matter by USIA officials was inaccurate and at times contradictory.

The following sequence of events which led to the reporting by USIA of inaccurate information has been reconstructed by Committee staff:

When the Director was interviewed by Mr. Safire and Ms. Perlez on December 26, 1983, they presented him with a Freedom of Information Act (FOIA) request for a variety of materials related to his recording practices. Consequently, Mr. Wick contacted his closest personal assistants and asked them to prepare a statement for him with respect to his recording practices and also to assess the FOIA request.

Later that same day, December 26, Mr. Wick's Executive Assistant telephoned the New York Times and spoke with Mr. Safire about the Director's recording practices in an effort to make it clear that this was not done with any illegal or malicious intent. During that conversation, the Executive Assistant did tell Mr. Safire that he "had the impression" that Mr. Wick had tape-recorded telephone conversations without the consent of all parties to such conversations. The following day, December 27, 1983, the Executive Assistant met with the Director's personal staff and instructed them to begin gathering all materials that might relate to the Director's tape-recording or notetaking of telephone conversations and any other materials requested pursuant to the Safire FOIA request. While these materials were being assembled, Mr. Wick's staff attempted to determine the precise dates on which he

had begun tape-recording telephone conversations and when he had stopped doing so.

According to USIA employees, Mr. Safire and Ms. Perlez had indicated that they would include a statement by the Director on this matter in the article that they were planning to publish in the New York Times on December 28, 1983. Consequently, Mr. Wick's Executive Assistant asked officials in the USIA Management Bureau to determine when Mr. Wick's desk-model Dictaphone had been modified to permit telephone calls to be tape-recorded. Apparently, the effort at that time was focused on the installation of that particular unit and did not take into account Mr. Wick's use of a hand-held tape recorder to record telephone conversations. During this time, December 27, 1983, Mr. Wick was not at his USIA office but had instructed his staff to do whatever was necessary to collect the materials and to prepare a public statement on the matter. Later that afternoon, officials in the Management Bureau determined from a review of purchase orders that the attachment to Mr. Wick's desk model Dictaphone had been installed in January of 1982 although the removal date had not yet been established. This information was communicated to one of Mr. Wick's assistants. However, the Management Bureau official who telephoned the Director's assistant to relay this information is unsure whether he reported it as January 1982 or January 1983. Subsequent to this communication, the assistant who received the information telephoned Mr. Wick at his home and read the statement that had been prepared on his behalf and that was to be read to the New York Times. This statement began by saying "From January 1983 until _____" with respect to his tape-recording of telephone conversations. Mr. Wick told Committee staff that while he may have heard his assistant say "January 1983", although he cannot recall this specifically, he believes he probably would have told his assistant to use that date because he was taking his staff at their word with respect to the installation and removal of the recording attachment. Mr. Wick told Committee staff that at that point he considered the precise dates of his tape-recording less critical than the substance of his actions i.e., tape-recording telephone conversations without consent.

The assistant who telephoned Mr. Wick with the January 1983 date confirmed that the Director played no role in determining the precise dates of his recording but that the statement had been read to him prior to the assistant telephoning the New York Times. The statement using the January 1983 date was then called into the New York Times although at that point USIA officials still did not know the date on which the recording attachment had been removed. This could not be determined because the individual who had removed it was on leave and could not be reached until the next day. The assistant who telephoned the New York Times stated to Committee staff that after giving this information to the newspaper she began to doubt its accuracy and discussed this matter with Mr. Wick's Executive Assistant who agreed that the date did not sound correct. Consequently, Mr. Wick's Executive Assistant telephoned the newspaper to indicate that the January 1983 date should not be used but rather the phrase "for a limited time" should be substituted until USIA officials were able to determine

the correct dates. Nevertheless, the article as it appeared in the New York Times on December 28th, referred to January 1983 as the starting point for the Director's tape-recording of telephone conversations.

The next day, December 28, 1983, it was determined that the recording attachment had been disconnected from Mr. Wick's desk model Dictaphone in July of 1983 and that the correct date of its installation was January 1982. As a result, the USIA press officer began informing the press that the recording equipment had been installed in January 1982 and removed in July of 1983.

The New York Times story of December 28th states that Mr. Wick had telephoned the newspaper with an incorrect statement. However, Mr. Wick has told Committee staff that he never telephoned the New York Times and his personal assistant has confirmed that she telephoned the Director's statement to the newspaper. It is possible, however, that the December 28 article which refers to Mr. Wick telephoning the New York Times is based upon his prepared statement that had been communicated to the newspaper by his assistant.

Mr. Wick's Executive Assistant commented to the Committee staff that most of the staff who now work with the Director came to his office in late 1981 or thereafter. Consequently, the scope of Mr. Wick's recording practices were not really established until after USIA assembled the materials requested by the House Foreign Affairs Committee and the Senate Foreign Relations Committee. At that point, it was determined conclusively that Mr. Wick had tape-recorded telephone conversations prior to January 1982.[5]

H. Is there any credible reason to believe that materials requested by the Committee on Foreign Relations or pursuant to the Safire FOIA request for December 26, 1983, have been withheld from the Committee or have been altered or destroyed?

In the course of this review, Committee staff has asked every person interviewed who may have had any contact with the materials requested by the Foreign Relations Committee and by William Safire, whether such materials have been destroyed, altered, or withheld, or whether any person has been instructed to destroy, withhold, or alter any such materials. The respondents, without exception, stated that they knew of no such actions. To the contrary, the persons who collected the materials were instructed not to tamper with them in any fashion.[6] (See Appendix 6 for letter of USIA General Counsel, dated January 20, 1984 concerning provision of materials to the SFRC.)

I. Do the materials provided on January 9, 1984 by the USIA to the Committee on Foreign Relations reveal any evidence of illegal conduct by Charles Wick?

[5] On January 9, 1984, USIA provided the requesting Congressional Committees with all known materials related to Mr. Wick's recording practices. An accompanying fact sheet was also issued which indicated with much greater precision the dates on which such recording had commenced and ended. (See Appendix 4 for copies of USIA statements and fact sheets with respect to Mr. Wick's taping and notetaking practices.)

[6] It was reported to Committee staff that on December 27, 1983, William Safire telephoned the Chief of Security at USIA to inform him that it was illegal to destroy any materials requested pursuant to the Freedom of Information Act and that such materials might be in the process of being destroyed or tampered with in the Director's office. Consequently, the Director of Security asked Mr. Wick's Executive Assistant how the materials were being handled, and Mr. Wick's Executive Assistant stated that the materials were not being tampered with or destroyed.

Since Mr. Wick readily admits that on numerous occasions he recorded telephone conversations without the consent of the parties with whom he was speaking, it is clear that the Director violated the applicable GSA regulations brought to his attention on or about December 17, 1981. The GSA report on this matter concluded that Mr. Wick did, in fact, violate the GSA regulations. It should be noted, however, that the GSA regulations that were violated are considered "preferred management practices" by GSA rather than regulations that carry sanctions under law or administrative practice such as those promulgated by the EPA, SEC, or FTC.[7]

Based upon the Committee staff review of the materials provided to it by the USIA, it has been determined that Mr. Wick tape-recorded telepone calls while in the State of Florida without the consent of the parties to such calls. It should be noted that the persons with whom Mr. Wick was speaking did not appear to be located in Florida when the calls were tape-recorded. It may be a criminal offense in Florida to tape-record telephone calls without the consent of all parties to such calls.[8]

It is also possible that Mr. Wick tape-recorded a telephone conversation while he was in the State of California, speaking with a person located in the State of California. It further appears that this conversation was tape-recorded without the consent of the person speaking with Mr. Wick. It may be a criminal offense in California to tape-recorded telephone conversations without the consent of all parties to such calls. Pursuant to a request by Committee staff, the American Law Division of the Congressional Research Service has prepared a short memorandum of law on the potential application of the Florida and California statutes to the facts described above. (See Appendix 8 for CRS memorandum of law.)

The applicable Federal law, 18 USC, Section 2511(2)(d) provides that it is a violation of Federal law for a telephone conversation to be recorded by one party without the consent of the other party to such a conversation if the purpose of such recording is to commit "any criminal or tortious act in violation of the Constitution or the laws of the United States or of any State or for the purpose of committing any other injurious act." Based upon the Committee staff review, there does not appear to be any credible evidence indicating that Mr. Wick tape-recorded telephone conversations for the purpose of committing any criminal or tortious act in violation of the Constitution or any State law. Rather, it has been uniformly reported to Committee staff that Mr. Wick's purposes in making such recordings and instructing his secretaries to take notes of his telephone conversations were related to legitimate USIA functions.

[7] On January 23, 1984, the GSA issued its findings and recommendations with respect to Mr. Wick's recording practices. (See Appendix 7 to this report for GSA findings and recommendations.) Further, the Archivist of the United States is now reviewing USIA's compliance with Federal regulations pertaining to records maintenance. The USIA General Counsel maintains that USIA records have been retained and disposed of in accordance with GSA guidelines.

[8] It was reported in the New York Times on January 25, 1984 that the State Attorney for Palm Beach county, Florida had decided not to initiate any legal action against Mr. Wick because when the totality of the circumstances are considered, "it doesn't warrant further action." He noted however that "if he was in the State of Florida when the calls were made, then our statute applies."

APPENDIX 1

[From the New York Times, Dec. 28, 1981]

U.S.I.A. DIRECTOR ACKNOWLEDGES TAPING TELEPHONE CALLS IN SECRET

(The following article is based on reporting by William Safire and Jane Perlez and was written by Miss Perlez.

WASHINGTON.—The director of the United States Information Agency, Charles Z. Wick, has secretly tape-recorded his office telephone conversations with Government officials, his staff and friends, according to his aides and to transcripts of the conversations.

In an interview on Monday, Mr. Wick denied that he had taped telephone calls surreptitiously, saying he had always informed the other party when a conversation was being recorded.

After six of his callers said they had been secretly taped, Mr. Wick telephoned a statement to the New York Times late today saying that starting in January of this year, he recorded "a small percentage" of his telephone conversations and had not always informed the other party.

PRACTICE DISCONTINUED, HE SAYS

The statement, which he said had been approved by the White House counsel, Fred F. Fielding, said that the practice had been discontinued, but it did not say when.

"I often advised the caller that I was recording the conversation or a portion of it, but in haste I did not do this consistently," Mr. Wick's statement said. "I may have been insufficiently sensitive to concerns some may have about the practice of recording telephone conversations; accordingly I discontinued the practice."

No Federal or District of Columbia statute makes it a crime for one party to tape a telephone conversation without the knowledge or the consent of another. But legal experts say that at least 13 states, including California, Florida and Maryland, have criminal statutes prohibiting such taping.

The New York Times has obtained transcripts of some of Mr. Wick's telephone conversations, which all took place in 1982, that his callers say must have been taped, although they did not know it at the time.

Transcripts were read to Senator Mark O. Hatfield, Republican of Oregon and chairman of the Senate Appropriations Committee; Kenneth L. Adelman, the director of the United States Arms Control and Disarmament Agency, and Walter H. Annenberg, former Ambassador to Britain. They all said they recalled the conversations but said they had not been told by Mr. Wick they were being taped.

KIRK DOUGLAS SPOKE TO HIM

The actor, Kirk Douglas, Caspar W. Weinberger Jr., the son of the Defense Secretary who worked for Mr. Wick at the agency, and the Ambassador to Belgium, Geoffrey Swaebe, whose conversations were taped and transcribed in 1982, said they were not informed of the taping.

Mr. Wick, who is a close friend of President Reagan and who with his wife spent Christmas Day with Mr. and Mrs. Reagan at the White House, said in the Monday interview that he had dismantled the taping equipment attached to his office Dictaphone "a year ago or more" because "I didn't want it misunderstood" around the agency.

"I've never done it without telling somebody," Mr. Wick said on Monday of the taping. "I had it pulled out I don't know, a year ago or more."

Mr. Wick's executive assistant, Robert L. Earle, 32 years old, asked whether Mr. Wick surreptitiously taped calls, said: "I have the impression that such a thing hap-

pened." He added: "I'm not aware of a specific instance where the director taped a call without warning."

Mr. Earle, who is a Foreign Service officer, said that he had warned Mr. Wick that such a practice was an invasion of privacy and "in nobody's interest." Mr. Earle said he believed that Mr. Wick had "no intentions to subvert anything, he just pushed himself to the physical limit to find out what's going on."

In the interview with Mr. Wick, which took place in his rented home in the Northwest section of the capital, the director, who is 66, said that he was an inveterate user of a Dictaphone.

He said that when the agency moved into a new building in May, the Dictaphone system he had used in his previous office was moved into his new office. He said it was a Dictaphone purchased with Government funds.

The district manager of Dictaphone in Washington, Daniel J. Hilbert, said an examination of his files showed that Mr. Wick's office had bought a "micro-cassette desktop Dictaphone unit, Model 3891" which was capable of making recordings of telephone conversations. The telephone recording on this model is activated by a light touch of the finger on a control.

Asked if he had any audio tapes made from telephone conversations in his possession, Mr. Wick, who is a lawyer, replied "Not to my knowledge." When the question was repeated, Mr. Wick said: "It's not my practice to have them."

Mr. Wick, who angrily refused to continue the interview after 15 minutes, acknowledged that he had been warned "some time ago" by Jonathan W. Sloat, then the general counsel to United States Information Agency, that he should not tape without permission.

HE CONCLUDES IT IS ILLEGAL

"That's when I became concerned about how it might look with some of the word going around," Mr. Wick said. The director said he had then examined the laws and regulations concerning taping and had reached the conclusion that it was illegal to tape over the telephone without the other party's permission.

Although such taping is not illegal under Federal statutes, the American Bar Association and many state bar associations say it is unethical for a lawyer to tape a telephone conversation without the permission of all participants.

Asked specifically if he had secretly taped Mr. Hatfield, Mr. Adelman and Mr. Annenberg, Mr. Wick said he had not.

According to current and former aides, Mr. Wick's office procedure called for daily notes to be typed from cassettes from his Dictaphone. Copies of some of these, dated March 1982 to March 1983, came into the possession of the New York Times.

THEY MOSTLY INVOLVE THOUGHTS

They consisted primarily of Mr. Wick's own dictation of "thoughts in the middle of the night" and thoughts in the office, and telephone conversations, according to Mr. Earle.

These cassettes were transcribed by one of Mr. Wick's secretaries and the transcriptions were marked into what the office called "action requests" and distributed to members of his staff for follow-up, according to present and former aides.

The transcriptions were titled "CZW Daily Notes" and some of them contained verbatim transcripts of telephone conversations, such as those with Senator Hatfield, Mr. Adelman, Mr. Annenberg, Mr. Douglas and the younger Mr. Weinberger.

Senator Hatfield, after being read a transcript of a conversation about a John Adams quotation on the American Revolution with the director in October 1982, said be remembered talking to Mr. Wick. "I never knew that I was being recorded," said Mr. Hatfield. "I would have liked to know whether I was being recorded. I don't appreciate it."

Mr. Adelman, who according to a transcript also spoke to Mr. Wick in October 1982, said he recalled the conversation, which was about the nuclear freeze, but did not know of the taping. "I am surprised," he said.

Also in October last year, the transcripts show, Mr. Wick spoke to Mr. Annenberg about policy on unemployed automobile workers. Mr. Annenberg, who has invited Mr. Wick to his annual New Year's Eve party with the President and top Administration officials, said he had no idea he was being taped.

"To my memory, nobody—nobody—has ever asked my permission to record a conversation with me," Mr. Annenberg said.

Mr. Wick taped the younger Mr. Weinberger in March 1982 regarding his job performance. Mr. Weinberger said he had no knowledge of the taping but did not find anything unusual about it. "I am not bothered by it," Mr. Weinberger said.

One of the transcribed telephone conversations made available to The Times showed that Mr. Wick spoke to Ambassador Swaebe while he was at United States Mission to the European office of the United Nations in November 1982.

CONVERSATION ABOUT LINKLETTER

Mr. Swaebe, now Ambassador to Belgium, who described himself as a longtime friend of Mr. Wick, said he recalled the conversation about the visit of the entertainer Art Linkletter to the Swaebe home in Geneva. He said he could not remember if Mr. Wick had informed him that he was being taped.

But Mr. Swaebe said he was not particularly surprised that Mr. Wick had taped the conversation. "He has a habit of making it very public," Mr. Swaebe said of Mr. Wick's taping in his office. "I'm not sure as close as we are that he would find it necessary to say it to me" over the telephone.

Mr. Douglas, reached at his home in Palm Springs, said that he did not know that a conversation with Mr. Wick about his overseas trips on behalf of the agency had been taped. Mr. Douglas added that while in principle he thought an individual should be informed he was being taped in a telephone conversation. "Frankly, from my point of view I don't care."

Another transcription involved a former director of the United States Information Agency, Leonard H. Marks. According to the transcript, he told Mr. Wick last December how he had acted as an intermediary between Mr. Wick and the Foreign Minister of Sri Lanka concerning a matter before the General Assembly.

Mr. Marks, who is a friend of Mr. Wick, said that he had advised Mr. Wick to tape the conversation "so that he could share it with his general counsel and others."

APPENDIX 2

United States Senate

COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, D.C. 20510

January 4, 1984

Mr. Charles Z. Wick
Director
U.S. Information Agency
301 C Street, S.W.
Washington, D.C. 20547

Dear Mr. Wick:

This morning two members of the Committee staff, Charles Berk and John Ritch, met with USIA General Counsel, Tom Harvey, to discuss the Committee's review of your past recording and transcription while USIA Director of telephone and other conversations without the knowledge or consent of the party with whom you were speaking.

So that the Committee staff can conduct its review properly, I request that you provide the Committee on Foreign Relations with all materials related to or generated by your recording and transcription of the conversations at issue.

Your cooperation and prompt attention to this request are greatly appreciated.

Sincerely,

Charles H. Percy
Chairman

Note: This is a facsimile of the original letter.

APPENDIX 3

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title or section 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter, or section 605 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub. L. 91-358, title II, § 211(a), July 29, 1970, 84 Stat. 654; Pub. L. 95-511, title II, § 201(a)-(c), Oct. 25, 1978, 92 Stat. 1796, 1797.)

REFERENCES IN TEXT

The Foreign Intelligence Surveillance Act of 1978, referred to in pars. (2)(e) and (f), is Pub. L. 95-511, Oct. 25, 1978, 92 Stat. 1783, which is classified principally to chapter 36 (§ 1801 et seq.) of Title 50, War and National Defense. Section 101 of the Foreign Intelligence Surveillance Act of 1978, referred to in pars. (2)(a)(ii), (e), and (f), is classified to section 1801 of Title 50. For complete classification of this Act to the Code, see Short Title note set out under section 1801 of Title 50 and Tables.

Sections 605 and 606 of the Communications Act of 1934, referred to in par. (2)(e) and (f), are classified to sections 605 and 606 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, respectively.

AMENDMENTS

1978—Par. (2)(a)(ii). Pub. L. 95-511, § 201(a), substituted provisions authorizing communication common carriers etc., to provide information to designated persons, prohibiting disclosure of intercepted information, and rendering violators civilly liable for provision exempting communication common carriers from criminality for giving information to designated officers.

Par. (2)(e). Pub. L. 95-511, § 201(b), added par. (2)(e).

Par. (2)(f). Pub. L. 95-511, § 201(b), added par. (2)(f).

Par. (3). Pub. L. 95-511, § 201(c), struck out par. (3) which provided that nothing in this chapter or section 605 of title 47 limited the President's constitutional power to gather necessary intelligence to protect the national security and stated the conditions necessary for the reception into evidence and disclosure of communications intercepted by the President.

1970—Par. (2)(a). Pub. L. 91-358 designated existing provisions as cl. (i), and added cl. (ii).

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-511 effective Oct. 25, 1978, except as specifically provided, see section 301 of Pub. L. 95-511, set out as an Effective Date note under section 1801 of Title 50, War and National Defense.

EFFECTIVE DATE OF 1970 AMENDMENT

Section 901(a) of Pub. L. 91-358 provided in part that the amendment by Pub. L. 91-358 shall take effect on the first day of the seventh calendar month which begins after July 29, 1970.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2513 of this title.

West's FLORIDA STATUTES ANNOTATED

§§ 933.01 to End

Under Arrangement of the Official Florida Statutes

Volume 24

Title XLV
CRIMINAL PROCEDURE

Title XLVI
CORRECTIONAL SYSTEM

ST. PAUL, MINN.
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CHAPTER 934

SECURITY OF COMMUNICATIONS

Sec.

934.01 Legislative findings

On the basis of its own investigations and of published studies, the legislature makes the following findings:

(1) Wire communications are normally conducted through the use of facilities which form part of an intrastate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of

crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

Historical Note

Derivation:

Laws 1969, c. 69-17, § 1.

Legislative Reference Bureau—1969:

Of most significance to the war against organized crime is House Bill 2, Chapter 69-17, the electronic surveillance or "wire tapping" bill. Chapter 119 of the "Omnibus Crime Control and Safe Streets Acts of 1968" established procedure for wire interception and interception of oral communications on the Federal level. Prior to the enactment of the wiretap bill, the injuring or tapping of telegraph or telephone lines was prohibited in Florida by Section 822.10, Florida Statutes, which prescribed a penalty upon conviction of not more than five years in prison or fine not exceeding $5,000 or both. It has long been recognized by law enforcement officers that one of the key instruments utilized by organized crime in the conducting of its business is the telephone. The wire tapping statute will now permit state, county and municipal law enforcement officers to conduct an electronic surveillance under certain conditions, after following proper procedures, as outlined in the act, and after obtaining court permission. It further provides that any evidence lawfully obtained can be used in evidence in prosecution of any case made. With one exception the state law follows closely the Federal act. The Florida act however, does not contain the provision for an "emergency" wiretap as contained in the Federal act. It must be noted that this act does not permit indiscriminate wire tapping under any and all conditions but as a matter of fact prohibits the same and calls for civil and criminal damages for the illegal possession of wire tapping or electronic surveillance equipment or the unlawful placing of a wiretap without court authority or the conducting of an electronic surveillance without court authority. This act is effective September 1, 1969.

Library References

Telecommunications ⇨493 et seq.

C.J.S. Telegraphs, Telephones, Radio and Television §§ 122, 287, 288.

934.02 Definitions

As used in this chapter:

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmis-

sion of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications;

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

(4) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facility or any component thereof furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(5) "Person" means any employee or agent of the state or political subdivision thereof and any individual, partnership, association, joint stock company, trust, or corporation;

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

(7) "Contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(8) "Judge of competent jurisdiction" means justice of the supreme court, judge of a district court of appeal, circuit judge, or judge of any court of record having felony jurisdiction of the state;

(9) "Aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Historical Note

Derivation:

Laws 1972, c. 72-294, § 1.
Laws 1969, c. 69-17, § 2.

Laws 1972, c. 72-294, § 1, amended subsec. (6) to include officers of the United States within the definition of investigative or law enforcement officer.

934.03 Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication;

(b) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

(2) (a) It is not unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment

while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It is not unlawful under this chapter for an officer, employee, or agent of the federal communications commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. ch. 5,[1] to intercept a wire communication or oral communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is not unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It is not unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal act.

[1] 47 U.S.C.A. § 151 et seq.

Historical Note

Derivation:

Laws 1971, c. 71-136, § 1163.
Laws 1969, c. 69-17, § 3.

Laws 1971, c. 71-136, § 1163, made the offense defined by subsec. (1) (d) of this section a "felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084" in lieu of the provision that offenders "be fined not more than $10,000 or imprisoned in the state penitentiary for not more than five years, or by both such fine and imprisonment, upon conviction therefor."

Library References

Telecommunications ⇨493, 494, 497.

C.J.S. Telegraphs, Telephones, Radio and Television §§ 122, 287, 288.

Historical Note

Derivation:

Laws 1969, c. 69-17, § 9.

Library References

Telecommunications ⇨496.

C.J.S. Telegraphs, Telephones, Radio and Television §§ 122, 287, 288.

Notes of Decisions

I. In general

Section 934.07 providing that State Attorney may authorize application for court order permitting interception of wire or oral communications permits delegation of such authority to any Assistant State Attorney. State v. Angel, App., 261 So.2d 198 (1972).

934.10 Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use, such communications, and shall be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(2) Punitive damages; and

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action under the laws of this state.

Historical Note

Derivation:

Laws 1969, c. 69-17, § 10.

Library References

Telecommunications ⇨498.

C.J.S. Telegraphs, Telephones, Radio and Television §§ 287, 288.

CHAPTER 935

Reserved as in Florida Statutes for Future Expansion

West's ANNOTATED CALIFORNIA CODES

PENAL CODE

Sections 447 to 680

Official California Penal Code Classification

ST. PAUL, MINN.
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Chapter 1.5

INVASION OF PRIVACY

Sec.

Chapter 1.5 was added by Stats.1967, c. 1509, p. 3584, § 1.

§ 630. Legislative finding and intent

The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.

The Legislature by this chapter intends to protect the right of privacy of the people of this state.

The Legislature recognizes that law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers. Therefore, it is not the intent of the Legislature to place greater restraints on the use of listening devices and techniques by law

enforcement agencies than existed prior to the effective date of this chapter.

(Added by Stats.1967, c. 1509, p. 3584, § 1.)

Historical Note

Former section 630 was repealed by Stats.1933, c. 73, p. 511, § 1421. See Historical Note under chapter heading preceding § 626. See, also, Fish and Game Code §§ 2303, 3504, 4301 for related matter.

Law Review Commentaries

Eavesdropping under court order and the constitution: Berger v. New York. (1968) 1 Loyola L.Rev. 143.

Electronic surveillance after Berger. (1968) 5 San Diego L.Rev. 107.

Library References

Telecommunications ⇐191.

C.J.S. Telegraphs, Telephones, Radio and Television §§ 287, 288.

Notes of Decisions

1. Construction and application

Since legislature has expressly conferred on the public utilities commission power to determine and fix rules, practices, equipment, appliances, facilities, service, or methods of public utilities and power to prescribe rules for performance of services or furnishing of commodities by public utilities, and since provision of § 631, concerning applicability of § 631, which was added in 1967, does not limit exercise of this power, the enactment of said provision would not preclude the commission from regulating the overhearing or recording of telephone and telegraph conversations by public utilities or their officers or employees. Op.Leg.Counsel, 1967 A.J. 2518.

§§ 630a, 630b. Repealed by Stats.1933, c. 73, p. 511, § 1421

Historical Note

Former section 630a related to reports of game taken. See Historical Note under chapter heading preceding § 626. For related material, see Fish & G. C. §§ 4008, 8011, 8014, 8016, 8018, 8019, 8021.

Former section 630b was omitted from the Fish and Game Code as obsolete.

§ 631. Wiretapping

(a) **Prohibited acts; punishment; recidivists.** Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any such wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 632 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) **Exceptions.** This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(c) **Evidence.** Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(Added by Stats.1967, c. 1509, p. 3584, § 1.)

Historical Note

Former section 631, added by Code Am. 1880, c. 107, p. 42, § 2, amended by Stats. 1891, c. 63, p. 73, § 1; Stats.1883, c. 43, p. 81, § 2; Stats.1887, c. 185, p. 237, § 2; Stats.1895, c. 202, p. 261, § 19; Stats.1901, c. 274, p. 822, § 18; Stats.1905, c. 287, p. 257, § 10 repealed by Stats.1933, c. 74, p. 511, § 1421, related to unlawful devices for taking game. See, now, Fish & G. C. § 3005.

Derivation: Former section 640, enacted 1872, amended by Stats.1905, c. 528, p. 691, § 6; Stats.1915, c. 117, p. 210, § 1; Stats.1955, c. 571, p. 1070, § 1; Stats.1965, c. 956, p. 2575, § 3.

Cross References

Line, malicious injury or unauthorized connection prohibited, see § 591.
Message,
- Forgery prohibited, see § 474.
- Fraudulent procurement of improper delivery prohibited, see § 637.1.
- Operator's appropriation of information transmitted prohibited, see Public Utilities Code § 7903.
- Willful alteration to injury of another prohibited, see § 620.
- Willful disclosure of contents without permission of addressee prohibited, see § 637.
- Willful opening without consent of addressee prohibited, see § 637.1.

Privacy of communications, investigation, see Public Utilities Code § 7906.
Records of discovery of devices for overhearing telephone conversations, see Public Utilities Code § 7905.
Trespass to commit act prohibited by this section, see § 634.
Willfully defined, see § 7.

Law Review Commentaries

Admissibility of evidence obtained through interception of telephone message. Murray Draper, (1959) 34 S.Bar J. 251, 267.

Background and general effect of 1965 amendment. Rev. of 1965 Code Leg. (Cont. Educ. of Bar, 1965) page 180.

Conspiracy and conspirators in California. (1952) 26 So.Cal.L.Rev. 61.

Curbing eavesdropping. (1965) 38 So. Cal.L.Rev. 622.

Eavesdropping and the law. Anthony P. Savarese, Jr. (1960) 46 A.B.A.J. 263.

Electronic surveillance after Berger. (1968) 5 San Diego L.Rev. 107.

Intercept, meaning of term as used in Federal Communications Act. (1948) 21 So.Cal.L.Rev. 424.

Intercepting intrastate telephone communications, admissibility of evidence obtained by federal agents. (1939) 28 C.L.R. 101.

Legal aspects of recording telephone conversations. Robert E. Hinerfeld (1965) 40 Los Angeles Bar Bull. 268.

Recording telephone conversations. Robert E. Hinerfeld (1965) 40 Los Angeles Bar Bull. 268.

State police, unconstitutionally obtained evidence and section 242 of the civil rights statute. (1954) 7 Stan.L.Rev. 76.

Unavailability of federal injunction against state officers' use of wire tap evidence in state courts. (1960) 48 C.L.R. 835.

Wiretap or dictograph, surveillance. W. H. Parker (1954) 42 C.L.R. 727.

Wiretapping.
Discussion. (1950) 2 Stan.L.Rev. 744.
Evidence obtained in violation of federal statute. (1938) 11 So.Cal.L. Rev. 369.
Exclusion of evidence so derived. (1940) 14 So.Cal.L.Rev. 82.

Wiretapping and eavesdropping. Francis C. Sullivan (1966) 18 Hast.L.J. 59.

Wire tapping with consent. (1956) 44 C.L.R. 780.

Library References

Telecommunications ⟸362, 493.

C.J.S. Telegraphs and Telephones §§ 122, 287.

Notes of Decisions

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1. Validity

Former § 640 was not unconstitutional as constituting an ex post facto statute inasmuch as the statute was effective many years prior to filing of charges involved, and punishment described was not in any way changed after commission of offenses involved. People v. Potter (1966) 49 Cal. Rptr. 892, 240 C.A.2d 621, certiorari denied 88 S.Ct. 2118, 388 U.S. 924, 18 L.Ed.2d 1374, rehearing denied 88 S.Ct. 20, 389 U.S. 890, 19 L.Ed.2d 205.

The federal wiretapping statute (47 U.S. C.A. § 605) applies to intrastate as well as interstate communications but state prohibitions against wiretapping within its own borders did not conflict with supremacy clause contained in the United States Constitution since the enactment of Federal Communications Act did not evince a congressional plan to occupy the field of wiretapping. Id.

2. Construction and application

State and federal law prohibits only the "unauthorized" interception of telephone communications. People v. Canard (1967) 65 Cal.Rptr. 15, 257 C.A.2d 444, certiorari denied 89 S.Ct. 231, 393 U.S. 912, 21 L.Ed.2d 198.

Eavesdropping statute did not repeal wiretap statute. People v. Snowdy (1965) 47 Cal.Rptr. 83, 237 C.A.2d 677.

Wiretap statute applies to all persons, including subscribers. Id.

The wire tapping statute is limited to taking or making of an unauthorized connection with a telephone wire or instrument or to obtaining of contents of a telephone message while the same is in transit

or passing over any telephone line, but section does not encompass the recording of conversation after it has reached intended recipient, and it was for purpose of prohibiting the last-mentioned activity that legislature enacted § 653j (repealed 1967. See, now, § 632) forbidding use of devices for eavesdropping or recording a confidential communication. People v. Fontaino (1965) 46 Cal.Rptr. 855, 237 C.A.2d 320, vacated 87 S.Ct. 855, 386 U.S. 263, 18 L.Ed.2d 45, opinion adopted in part on remand 60 Cal.Rptr. 325.

Former § 640 did not apply where one party to conversation has given his consent to overhearing or preservation of the conversation. Id.

Activities of police in tape recording telephone conversation between informant and defendant charged with selling marijuana were not in violation of right of privacy protected by Federal Communications Act or this section nor did they violate defendant's rights under state and federal constitutional provisions prohibiting unreasonable search and seizure. Id.

Fact that someone other than intended recipient of telephone call answers telephone and receives message transmitted does not establish violation of Federal Communications Act, 47 U.S.C.A. § 605, or former § 640 prohibiting obtaining of contents of telephone message while it is in transit or passing over any telephone. People v. Carella (1961) 12 Cal.Rptr. 446, 191 C.A.2d 115.

Former § 640 making it criminal act to tap or to make any unauthorized connection with any telegraph or telephone wire, was a prohibition against what is commonly known as "wire tapping" and disclosure of information wrongfully obtained thereby, and such section had no application to situation where one of parties to telephone conversation invites third person to listen in. People v. Dement (1957) 311 P.2d 505, 48 C.2d 600.

Where conversation was recorded, by means of induction coil, at the moment it reached the intended receiver, there was no "interception" within meaning of Federal Communications Act prohibition against unauthorized "interception" of communications; and nothing having been heard by officers except free discussion of crime by defendant, who thought her listener was a client, there was likewise no invasion of privacy in violation of this section. People v. Malotte (1956) 292 P.2d 517, 46 C.2d 59, appeal dismissed 77 S.Ct. 50, 352 U.S. 805, 1 L.Ed.2d 38.

Object of statutes prohibiting unauthorized connections to telegraph or telephone wires, wire tapping, unauthorized interception of private messages, appropriation by telephone or telegraph employees of information derived from a private message addressed to another person, or bribing of such employees to disclose contents of a private message is to prevent such employees from, giving out, to other than the addressee, or making a private use of messages sent and received, and also to prevent persons, not employees, from getting possession of contents of messages and information not intended for and not delivered to them by wire tapping. People v. Trieber (1946) 171 P.2d 1, 28 C.2d 657.

Statute, which penalizes unauthorized connections with telephone lines under control of any telegraph or telephone company, applies to wire tapping whether it be of the main or local switchboard or other instrument of any variety or of a main trunk or smaller line, wire, or cable. Id.

Statute which penalizes any unauthorized connection with telephone lines under control of a telegraph or telephone company, serves purpose of protecting secrecy of telegraphic and telephone messages, not by making subscriber the sole judge as to when and whether a connection shall be made, but by strengthening, with criminal sanctions, control of telegraph and telephone companies over their entire networks so that a company may more effectively supervise all connections. Id.

Since legislature has expressly conferred on the public utilities commission power to determine and fix rules, practices, equipment, appliances, facilities, service, or methods of public utilities and power to prescribe rules for performance of services or furnishing of commodities by public utilities, and since provisions concerning applicability of this section, does not limit exercise of this power, the enactment of said provision would not preclude the commission from regulating the overhearing or recording of telephone and telegraph conversations by public utilities or their officers or employees. Op.Leg.Counsel, 1967 A.J. 2518.

3. Elements of crime

Wiretap statute is violated if unauthorized act is done wilfully and fraudulently, or clandestinely, and fraud was not necessary element of offense where act was shown to have been committed wilfully and clandestinely. People v. Snowdy (1965) 47 Cal.Rptr. 83, 237 C.A.2d 677.

4. Unauthorized connection

Where defendant, with assistance of a telephone employee but without knowledge of the company, secured telephone extensions, which led to defendant's apartment and which were connected to telephones listed to other residents in the apartment building, such extensions constituted an "unauthorized connection" within meaning of the statute penalizing unauthorized connections, notwithstanding authorization of the telephone subscribers. People v. Trieber (1946) 171 P.2d 1, 28 C.2d 657.

5. Consent to monitoring

Monitoring of calls participated in by defendant over police department telephones

was not illegal in regard to prosecution of police officers and others for unlawful conspiracy, where telephones were used only for police business, chief of police ordered the monitoring, and one of participants to the monitored conversations, a police officer who was a feigned accomplice to the conspiracy, consented to the monitoring. People v. Canard (1967) 65 Cal.Rptr. 15, 257 C.A.2d 444, certiorari denied 89 S.Ct. 231, 393 U.S. 912, 21 L.Ed.2d 198.

Laws on eavesdropping and recording of telephone communications do not apply where one of parties to conversation consents to or directs its overhearing or recording. Id.

Evidence supported finding that informer's consent to eavesdropping or recording telephone conversations to him at point of reception was genuine even though he was under arrest and had been promised leniency. People v. La Peluso (1966) 49 Cal.Rptr. 85, 239 C.A.2d 715, certiorari denied 87 S.Ct. 61, 385 U.S. 829, 17 L.Ed.2d 65.

Telephone company customer buys service and has no right to trespass upon company's property, and any connection with company's line, without company's consent, is unauthorized. People v. Snowdy (1965) 47 Cal.Rptr. 83, 237 C.A.2d 677.

Where narcotic agent and informer entered telephone booth together, and agent placed twin telephone as listening apparatus on receiving end of telephone, and informer then dialed number identified as that of residence of defendant and ordered heroin, evidence was not obtained in violation of Federal Communications Act (47 U.S.C.A. § 605) and this section, and evidence of conversation was admissible in prosecution for sale of heroin. People v. Cooper (1965) 44 Cal.Rptr. 483, 234 C.A.2d 587, affirmed 87 S.Ct. 788, 386 U.S. 58, 17 L.Ed.2d 730, rehearing denied 87 S.Ct. 1283, 386 U.S. 988, 18 L.Ed.2d 243.

Where at least one participant in telephone conversation consents to the monitoring of conversation by police, evidence thus obtained is not inadmissible on ground that it was obtained illegally in violation of state or federal law. People v. Bates (1958) 330 P.2d 102, 163 C.A.2d 847.

6. Federal restrictions

The Federal Communications Act and the California statutes relating to wiretapping and eavesdropping or recording confidential communications and the Fourth and Fifth Amendments to the Federal Constitution do not encompass eavesdropping or recording at the point of reception with the consent of the intended recipient. People v. La Peluso (1966) 49 Cal.Rptr. 85, 239 C.A.2d 715, certiorari denied 87 S.Ct. 61, 385 U.S. 829, 17 L.Ed.2d 65.

In a state court, contents of telephone messages intercepted without consent of sender are admissible in evidence, even though such interception was in violation of the Federal Communications Act. People v. Sica (1952) 247 P.2d 72, 112 C.A.2d 571.

Federal rule as to admissibility of evidence of conversations obtained by tapping telephones and by use of microphones is not controlling upon the admission of such evidence in state courts. People v. Channell (1951) 236 P.2d 654, 107 C.A.2d 192.

7. Trial in general

Defendants were not prejudiced by court's refusal to permit jury to review information in jury room, where in response to jury's request to see the information, court directed jury to be returned and had clerk read the amended information in open court. People v. Potter (1966) 49 Cal.Rptr. 892, 240 C.A.2d 621, certiorari denied 87 S.Ct. 2118, 388 U.S. 924, 18 L.Ed.2d 1374, rehearing denied 88 S.Ct. 20, 389 U.S. 890, 19 L.Ed.2d 205.

In wiretapping prosecution, prosecutor's comment and court's instruction to the effect that defendants' failure to testify raised an inference of guilt as to facts within their knowledge did not result in miscarriage of justice so as to require reversal inasmuch as it was not reasonably probable that a result more favorable to defendants would have been reached if such error had not occurred. Id.

8. Indictment and information

Defendants charged with wiretapping were not placed in double jeopardy because court authorized district attorney to amend information during course of trial to include the words "wilfully, unlawfully, feloniously and fraudulently," where amendment was accomplished for purpose of correcting a technical defect, there was only one trial and nature of offense was not changed, nor were defendants prejudiced in any respect. People v. Potter (1966) 49 Cal.Rptr. 892, 240 C.A.2d 621, certiorari denied 88 S.Ct. 2118, 388 U.S. 924, 18 L.Ed.2d 1374, rehearing denied 88 S.Ct. 20, 389 U.S. 890, 19 L.Ed.2d 205.

9. Evidence—In general

Where monitoring of defendant's telephone was carried out by a security agent for telephone company, and communications intercepted by him were divulged upon a written demand of District Attorney, evidence of such communications was admissible in prosecution for, inter alia, conspiracy to obtain telephone service by fraud, to commit offense of unlawful use of telephone lines and equipment, and of conspiracy to illegally wiretap. People v. Garber (1969) 80 Cal.Rptr. 214, 275 C.A.2d —.

Where defendant charged with wiretapping willingly signed an acknowledgment of legal rights after he signed identification card in order to enable prosecution to be conducted in another county, admission of

copy of fingerprint identification card of such defendant which contained his prints and his signature did not violate his right against self-incrimination. People v. Potter (1966) 49 Cal.Rptr. 892, 240 C.A.2d 621, certiorari denied 87 S.Ct. 2118, 388 U.S. 924, 18 L.Ed.2d 1374, rehearing denied 88 S.Ct. 20, 389 U.S. 890.

Evidence of violation of wiretap statute established probable cause for commitment and supported information. People v. Snowdy (1965) 47 Cal.Rptr. 83, 237 C.A.2d 677.

Whether officer's evidence of telephone calls was inadmissible as having been obtained in violation of former § 640 and Federal Communications Act could not be considered by trial court or reviewing court in absence of objection to admission of evidence on that ground. People v. Rojas (1961) 10 Cal.Rptr. 466, 358 P.2d 921, 55 C.2d 252.

In robbery prosecution, permitting police officer to testify to what he heard of telephone conversation between witness whose property was taken and defendant was not violative of this section, proscribing an unauthorized connection with a telephone, Federal Communications Act, 47 U.S.C.A. § 605, proscribing interception of a communication and divulging the contents thereof, Pub.Util.C. § 7903, proscribing certain conduct of employees of telephone company and as amounting to an unlawful search and seizure and a denial of due process of law. People v. Cahan (1956) 297 P.2d 715, 141 C.A.2d 891, certiorari denied 77 S.Ct. 214, 352 U.S. 918, 1 L.Ed.2d 124.

In prosecution for attempted murder and other offenses committed by bombing, evidence that police intelligence unit, of which defendants were members, had as part of its espionage of victim, tapped telephone wires leading to victim's home, was admissible to show overt acts pursuant to alleged coospiracy in preparing for assault on victim, irrespective of whether particular defendant was actually present when wires were tapped. People v. Kynette (1940) 104 P.2d 794, 15 C.2d 731, certiorari denied 61 S.Ct. 806, 312 U.S. 703, 85 L.Ed. 1136.

10. —— Intercepted message, admissibility

Admission of testimony in bookmaking prosecution concerning contents of telephone calls received by police officers at defendant's apartment after arrest of defendant did not violate Federal Communications Act, § 605 or provision of former § 640 prohibiting obtaining of contents of telephone message while in transit or passing over any telephone. People v. Carella (1961) 13 Cal.Rptr. 446, 191 C.A.2d 115.

Where police officer listened to telephone conversation between defendant and an informant, relating to purchase of narcotics, by means of amplifier attached to telephone receiver and extension cord, and with informant's consent, there was no invasion of constitutional right of privacy or violation of former § 640, and officer's description of the conversation was admissible. People v. Lawrence (1957) 308 P.2d 821, 149 C.A.2d 435.

Evidence of contents of telephone messages intercepted without consent of sender is admissible notwithstanding such interception was in violation of Federal Communications Act. People v. Channell (1951) 236 P.2d 654, 107 C.A.2d 192.

11. —— Recording, admissibility

Record on appeal from conviction warranted inference that one party to telephone conversation had voluntarily consented to the monitoring of conversation by officers and hence supported ruling that evidence as to contents of conversation was admissible against the other party thereto. People v. Bates (1958) 330 P.2d 102, 163 C.A.2d 847.

In prosecution for conspiracy to carry on a bookmaking enterprise, contemporaneous recordings of defendants' conversations were competent, but not sole, evidence admissible on the point, and testimony of officers who had heard the conversation and seen the recording being made was primary evidence, even though part of the same matter had been incorporated into the sound recording. People v. Sica (1952) 247 P.2d 72, 112 C.A.2d 574.

12. —— Testimony of defendant, admissibility

In wiretapping prosecution, codefendant's statements that he had been in attic above victim's apartment endeavoring to determine if someone had tapped victim's telephone and his denial of installing any radio transmitters in building or receiving any transmissions with radio receiver were exculpatory and not incriminating and hence were not prejudicial even though he was not advised as to right to counsel and to remain silent. People v. Potter (1966) 49 Cal.Rptr. 892, 240 C.A.2d 621, certiorari denied 87 S.Ct. 2118, 388 U.S. 924, 18 L.Ed. 2d 1374, rehearing denied 88 S.Ct. 20, 389 U.S. 890, 19 L.Ed.2d 205.

13. —— Testimony of listener, admissibility

In prosecution for carrying on a bookmaking enterprise, testimony of officers, who had heard defendants' conversations and had seen recording thereof being made, was primary evidence, even though part of the same matter had been incorporated into the recording. People v. Sica (1952) 247 P. 2d 72, 112 C.A.2d 574.

Testimony of district attorney's stenographer, who listened in and took notes over concealed microphone equipment, was properly admitted. People v. Collins (1947) 182 P.2d 585, 80 C.A.2d 526, certiorari denied 69 S.Ct. 16, 335 U.S. 831, 93 L.Ed. 384, certiorari denied 69 S.Ct. 1524, 337 U.S. 961, 93 L. Ed. 1759.

14. Memorandum made from recording

In prosecution for conspiracy to carry on a bookmaking enterprise, use of memoranda prepared by stenographer from recorded conversations overheard by police officers was properly used to refresh officers' recollections in view of facts that the transcriptions were corrected by the officers to correspond with what each had actually heard, and that the memoranda was used only to refresh officers' memories concerning information directly obtained by them. People v. Sica (1952) 247 P.2d 72, 112 C.A.2d 574.

15. Voice identification

In prosecution for conspiracy to carry on a bookmaking enterprise, upon issue of identification of participants in recorded conversations, testimony of witness, who recognized a voice and used this identification to name the speaker, was properly admissible, and any uncertainty in the recognition went only to weight of the testimony. People v. Sica (1952) 247 P.2d 72, 112 C.A.2d 574.

16. Instructions

In wiretapping prosecution, refusal to give defendants' offered instruction defining "feloniously", "unlawfully" and "fraudulent" was not error since quoted words are words of common usage which have no special legal meaning, and trial court need not instruct on meaning of ordinary language. People v. Potter (1966) 49 Cal.Rptr. 892, 240 C.A.2d 621, certiorari denied 87 S.Ct. 2118, 388 U.S. 924, 18 L.Ed.2d 1374, rehearing denied 88 S.Ct. 20, 389 U.S. 890, 19 L.Ed.2d 205.

§§ 631a to 631e. Repealed by Stats.1933, c. 73, p. 511, § 1421

Historical Note

For a general discussion of the repealed sections see Historical Note under chapter heading preceding § 626.

Former sections 631a, 631c and 631e related to violations and established certain minimum penalties. See, now, Fish & G. C. §§ 12000, 12002, 12005, 12006, 12007, 12010.

Former section 631b related to the disposition of fines and forfeitures for game violations. See, now, Fish & G. C. §§ 13003, 13100, 13101, 13102.

Former section 631d, added by Stats. 1913, c. 570, p. 981, § 1, amended by Stats. 1917, c. 774, p. 1620, § 1, related to the domestication of wild game. See, now, Fish & G. C. §§ 1004, 2400, 3200 et seq.

§ 632. Eavesdropping on or recording confidential communications

(a) **Prohibited acts; punishment; recidivists.** Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. If such person has previously been convicted of a violation of this section or Section 631 or 636, he is punishable by fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding five years, or by both such fine and imprisonment in the county jail or in the state prison.

(b) **Person.** The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication.

(c) **Confidential communication.** The term "confidential communication" includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

(d) **Evidence.** Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) **Exceptions.** This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or (2) to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility, or (3) to any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

(f) **Hearing aids.** This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

(Added by Stats.1967, c. 1509, p. 3585, § 1.)

Historical Note

Former section 632, enacted in 1872, amended by Code Am. 1873-74, c. 305, p. 464, § 1; Code Am. 1875-76, c. 451, p. 114, § 1; Stats. 1883, c. 43, p. 81, § 3; Stats. 1895, c. 202, p. 261, § 20; Stats. 1897, c. 24, p. 20, § 1; Stats. 1901, c. 60, p. 65, § 2; Stats. 1903, c. 22, p. 24, § 3; Stats. 1905, c. 192, p. 188, § 7; Stats. 1907, c. 239, p. 302, § 4; Stats. 1911, c. 338, p. 563, § 3; Stats. 1913, c. 580, p. 1004, § 1; Stats. 1915, c. 431, p. 716, § 1; Stats. 1917, c. 681, p. 1217, § 1; Stats. 1919, c. 216, p. 391, § 1; Stats. 1921, c. 276, p. 371, § 1; Stats. 1927, c. 575, p. 961, § 1; Stats. 1929, c. 727, p. 1332, § 1; Stats. 1931, c. 605, p. 1305, § 1, repealed by Stats. 1933, c. 73, p. 511, § 1421, related to the taking of fish and game for scientific or propagation purposes. See, now, Fish and Game Code §§ 1001, 1002, 2356 to 2358, 5505, 5507, 8431 to 8433, 10500, 13100 et seq. See, also, Historical Note under chapter heading preceding § 626.

Derivation: Former section 653h, added by Stats.1941, c. 525, p. 1833, § 1.

Former section 653j, added by Stats.1963, c. 1886, p. 3871, § 1.

Cross References

Divorce, separation and annulment cases, exclusion of evidence collected by eavesdropping, see Civil Code § 4520.
Libel, privilege, communication between mutually interested persons, see § 250.
Particular privileges, see Evidence Code § 930 et seq.
Person, see § 7.
Presumption that certain communications are confidential, see Evidence Code § 917.
Public utility, see Public Utilities Code § 216.
Publication of libel, threat or offer to prevent with intent to extort, see § 237.
Trespass to commit act prohibited by this section, see § 631.

Law Review Commentaries

Curbing eavesdropping. (1965) 38 So. Cal.L.Rev. 622.

Electronic eavesdropping. (1964) C.L.R. 142.

Electronic surveillance after Berger. (1968) 5 San Diego L.Rev. 107.

Exclusion of evidence obtained by illegal searches—a comment on People v. Cahan (1955) 43 C.L.R. 665.

Federalism and admissibility of illegally seized evidence. J. A. C. Grant (1961) 8 U. C.L.A.Law Rev. 1.

"Mere evidence" rule and government eavesdropping. (1967) 14 U.C.L.A.Law Rev. 1110.

Regulation of private police. (1967) 40 So.Cal.L.Rev. 540.

State police, unconstitutionally obtained evidence and section 242 of the civil rights statute. (1954) 7 Stan.L.Rev. 76.

Surveillance by wire tap or dictograph. W. H. Parker (1954) 42 C.L.R. 727.

Wiretapping: Denial of federal court to enjoin divulgence of wiretap evidence in state criminal trial. (1961) 8 U.C.L.A.Law Rev. 198.

Wiretapping and eavesdropping. Francis C. Sullivan (1966) 18 Hast.L.J. 59.

Notes of Decisions

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1. In general

State and federal law prohibits only the "unauthorized" interception of telephone communications. People v. Canard (1967) 65 Cal.Rptr. 15, 257 C.A.2d 444, certiorari denied 89 S.Ct. 231, 393 U.S. 912, 21 L.Ed.2d 198.

Eavesdropping statute did not repeal wiretap statute. People v. Snowdy (1965) 47 Cal.Rptr. 53, 237 C.A.2d 677.

Since former § 653j, forbidding use of devices for eavesdropping upon or recording a confidential communication, which became effective on September 20, 1963, did not specifically provide that its application was to be retroactive, use in narcotics prosecution of electronic device which recorded telephone conversations between informant and defendant in June and July 1963 was not a violation of this section and hence admission of such tape recordings was not error. People v. Fontaine (1965) 46 Cal.Rptr. 855, 237 C.A.2d 320, vacated 87 S.Ct. 1036, 386 U.S. 263, 18 L.Ed.2d 45, opinion adopted in part on remand 60 Cal. Rptr. 325.

The wire tapping statute (former § 640) was limited to taking or making of an unauthorized connection with a telephone wire or instrument or to obtaining of contents of a telephone message while the same was in transit or passing over any telephone line, but former § 640 did not encompass the recording of conversation after it had reached intended recipient, and it was for purpose of prohibiting the last-mentioned activity that legislature enacted former § 653j forbidding use of devices for eavesdropping or recording a confidential communication. Id.

In provision of former § 653j forbidding use of devices for eavesdropping or recording a confidential communication "without the consent of any party", legislature by using word "any" meant "one" especially in view of use of words "all" and "every" in other parts of section. Id.

Regulation dealing with the content of telephone messages and use of telephones by members of the general public is for the legislature. McDaniel v. P. T. & T. Co. (1965) 61 Cal.P.U.C. 707.

2. Purpose of law

Former § 653j (repealed. Now, this section) was not intended to punish a person who intended to make a recording but only a person who intended to make a recording of a confidential communication. People v. Superior Court of Los Angeles County (1969) 74 Cal.Rptr. 294, 449 P.2d 230, 70 C.2d 123.

Obvious purpose of this section is to proscribe electronic eavesdropping and not the recordation of a face-to-face conversation, the recitation of which would probably be more accurate from recording than from the memory of participants. People v. Albert (1960) 6 Cal.Rptr. 473, 182 C.A.2d 729.

3. Elements

Necessary element of offense of eavesdropping is an intent to record a confidential communication. People v. Superior Court of Los Angeles County (1969) 74 Cal. Rptr. 294, 449 P.2d 230, 70 C.2d 123.

4. Dictographs

Use of transmitting device, hidden on person of confederate of defendant charged with conspiracy to commit forgery, and of tape recorder in police officer's office to record conversation between the defendant and confederate, did not violate former § 653h, prohibiting unauthorized installation of dictographs. People v. Wootan (1961) 15 Cal.Rptr. 833, 195 C.A.2d 481.

A "Minifon", a self-contained recorder, is not a "dictograph" within language or intendment of former § 653h. People v. Albert (1960) 6 Cal.Rptr. 473, 182 C.A.2d 729.

A "dictograph" within former § 653h is an instrument for electrical transmission of sound from place where sound is received to another place where sound is made audible, and only a device coming within the above description is considered to be a "dictograph" within meaning of former § 653h. Id.

Dictograph installations, which are made by police officers and which violate constitutional provisions, cannot be made lawful by authorization of head of police department or of the district attorney. People v. Tarantino (1956) 290 P.2d 505, 45 C. 2d 590.

Provision of this section authorizing peace officer, with authorization by head of his office or department or by district attorney, to install a dictograph in a building without consent of owner, lessee or occupant for use in performance of their duties in detecting crimes does not and cannot authorize violations of the Constitution. People v. Cahan (1955) 282 P.2d 905, 44 C.2d 434.

Provision of this section making it a misdemeanor for any person, without consent of owner, to install or attempt to install or use a dictograph in any house, etc., and providing that the statute shall not prevent use and installation of dictographs by regular salaried peace officer, gives the police no greater right than if the statute did not exist. 24 Ops.Atty.Gen. 96.

5. Evidence—In general

Section 653j (repealed, this section) relating to admissibility of eavesdropping evidence did not require exclusion of recordings made prior to its effective date. People v. Chatfield (1969) 77 Cal.Rptr. 118, 272 C.A.2d —.

Where prosecutrix had complained to police that she had been raped by defendant during course of medical examination and by arrangements with police procured another appointment and carried a concealed microphone on her person, which was used in defendant's office to record conversation which included incriminating statements by defendant, wire recording was not illegally obtained and hence was not inadmissible for that reason. People v. Wojahn (1959) 337 P.2d 192, 169 C.A.2d 135.

Where secret entry of defendant's room to hide microphone therein was done by engineer, who was a private person, but who was employed by district attorney and police department, installation of microphone and eavesdropping by police violated constitutional provisions against unreasonable search and seizures, and, therefore, evidence so obtained would have to be excluded in subsequent prosecution for extortion and for conspiracy to commit extortion. People v. Tarantino (1956) 290 P.2d 505, 45 C.2d 590.

Where police officers in two instances surreptitiously and without consent of defendants placed microphones on premises occupied by defendants, and in other instances officers made forcible entries and seizures without search warrants, evidence obtained by such conduct was obtained in violation of constitutional guarantees against unreasonable searches and seizures and was inadmissible in prosecution of defendants for violation of bookmaking laws. People v. Cahan (1955) 282 P.2d 905, 44 C.2d 434.

Federal rule as to admissibility of evidence of conversations obtained by tapping telephones and by use of microphones is not controlling upon the admission of such evidence in state courts. People v. Channel (1951) 236 P.2d 654, 107 C.A.2d 192.

6. —— Identification of recorded voice, evidence

In prosecution for conspiracy to carry on a bookmaking enterprise in violation of the Penal Code, upon issue of identification of participants in recorded conversations, testimony of witness who recognized a voice and used this identification to name the speaker was properly admissible, and any uncertainty in the recognition went only to weight of the testimony. People v. Sica (1952) 247 P.2d 72, 112 C.A.2d 574.

7. Consent

Monitoring of calls participated in by defendant over police department telephones

was not illegal in regard to prosecution of police officers and others for unlawful conspiracy where telephones were used only for police business, chief of police ordered the monitoring, and one of participants to the monitored conversations, a police officer who was a feigned accomplice to the conspiracy, consented to the monitoring. People v. Canard (1967) 65 Cal.Rptr. 15, 257 C.A.2d 444, certiorari denied 89 S.Ct. 231, 393 U.S. 912, 21 L.Ed. 2d 198.

Laws on eavesdropping and recording of telephone communications do not apply where one of parties to conversation consents to or directs its overhearing or recording. Id.

The Federal Communications Act and the California statutes relating to wiretapping and eavesdropping or recording confidential communications and the Fourth and Fifth Amendments to the Federal Constitution do not encompass eavesdropping or recording at the point of reception with the consent of the intended recipient. People v. La Peluso (1966) 49 Cal.Rptr. 85, 239 C.A.2d 715, certiorari denied 87 S.Ct. 64, 385 U.S. 829, 17 L.Ed.2d 65.

Evidence supported finding that informer's consent to eavesdropping or recording telephone conversations to him at point of reception was genuine even though he was under arrest and had been promised leniency. Id.

Even if former § 653j was applicable in prosecution for selling marijuana, section was not violated by the police who made tape recordings of telephone conversations between informant and defendant because the informant consented to the recordation. People v. Fontaine (1965) 46 Cal.Rptr. 855, 237 C.A.2d 320, vacated 87 S.Ct. 1036, 386 U.S. 263, 18 L.Ed.2d 45, opinion adopted in part on remand 60 Cal.Rptr. 325.

8. Knowledge of recording

In view of uncontradicted testimony of police officer that twice he told defendant that any conversation between defendant and his brother would be recorded, admission into evidence of tape recording of conversation between defendant and his brother was not in violation of this section. People v. Blair, (1969) 82 Cal.Rptr. 673, 2 C.A.3d 249.

If private detective who was testing recording equipment which he had installed in defendant's office at defendant's request at time of recordation of confidential conversations was acting under the direction of defendant, private detective's conduct was not violative of § 653j (repealed, now, this section) and the recording would not be rendered inadmissible in prosecution of defendant for bribery. People v. Superior Court of Los Angeles County (1969) 74 Cal. Rptr. 294, 449 P.2d 230, 70 C.2d 123.

Where defendant and his accomplice had been advised of charges against them at time incriminating voice recording was made while they were under arrest, handcuffed and seated in back of police car, and defendant knew that conversation was being recorded, §§ 632 to 634 relating to recording of confidential communication were not violated. People v. Chandler (1968) 68 Cal.Rptr. 645, 263 C.A.2d 350, certiorari denied 89 S.Ct. 670, 393 U.S. 1013, 21 L.Ed.2d 591.

Admission in evidence of recorded conversation between incarcerated defendant and a visitor at the jail was not prohibited by former § 653j making eavesdropping upon or recording of a confidential communication by any electronic amplifying or recording device a crime in view of portion of former § 653h providing that it was not to be construed as prohibiting law enforcement officers from doing that which they otherwise were authorized by law to do and in view of fact that it was established that recording of a prisoner's conversation in such a manner was authorized under the law. People v. Apodaca (1967) 60 Cal.Rptr. 782, 252 C.A.2d 656.

9. Correctional facility

Conversation between incarcerated defendant and a visitor at jail was not a "privileged communication" within this section. People v. Apodaca (1967) 60 Cal. Rptr. 782, 252 C.A.2d 656.

§§ 632a to 632(4). Repealed by Stats.1933, c. 74, p. 511, § 1421

Historical Note

For a general comment on the repealed sections, which related to fish and game, see Historical Note under chapter heading preceding § 620.

Former section 632(a), added by Stats. 1905, c. 192, p. 186, related to the transportation of fish and game. For a related treatment of the subject, see, now, Fish & G. C. §§ 2346 to 2348.

Former section 632a, added by Stats.1921, c. 171, p. 179 in designated districts, restricted methods of fishing and prohibited the obstruction of streams. For related treatment of the subject, see Fish & G. C. §§ 5500 et seq., 7100 et seq., 12015.

Former section 632(4), added by Stats. 1911, c. 58, p. 74, § 1, prohibited ice fishing. See, now, Fish & G. C. § 5506.

Formal Opinion 337 **August 10, 1974**

With certain exceptions spelled out in this opinion, no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

Code of Professional Responsibility: Canons 1, 4, 7 and 9; Disciplinary Rule 1-102 (A)(4); and Ethical Considerations 1-5, 4-4, 4-5, 7-1, 9-2 and 9-6.

Recent technical progress in the design and manufacture of sophisticated electronic recording equipment and revelations of the extent to which such equipment has been used in government offices and elsewhere make it desirable to issue a Formal Opinion as to the ethical questions involved.

Attorneys may desire to record conversations to which the following three classes of persons may be party:

(a) Clients;
(b) Other attorneys with whom they deal;
(c) The public, including but not limited to, witnesses and public officials.

These would include conversations in which the attorney was not himself a party.

No prior Formal Opinion has been issued which deals directly with the problem. Informal Opinions have addressed the issue only in part.

Formal Opinion 150, issued in 1936, held that a prosecuting attorney could not ethically use a recording of conversation between defense attorney and his client in evidence in the prosecution of the defendant even though such recording was legally admissible at the time of the opinion. The Committee based its holding in part on the duty of attorneys in public employ to avoid the appearance of impropriety. The opinion also stresses the nature of the intercepted conversation (between

the accused and his counsel) as to which the attorney and client were entitled to confidentiality.

Informal Opinion No. C-480, issued in 1961, requires disclosure to the court and opposing counsel before using a recording device in court.

Informal Opinion No. 1008, issued in 1967, holds that a lawyer may not make a recording of a conversation with a client without previous disclosure.

Informal Opinion 1009, issued on the same day, makes a similar ruling as to conversation with an attorney for the other party. This opinion cites Opinion 201 of the Michigan Ethics Committee, Henry S. Drinker *Legal Ethics*, page 197, and New York City Committee, Opinions 848 and 290.

So far as clients and other attorneys are concerned, the prior Informal Opinions make the conclusion clear. Attorneys must not make recordings without the consent of these parties to the conversation.

A survey of state opinions listed in the *Digest of Bar Association Ethics Opinions* reveals the same pattern with only one opinion to the contrary: Texas Opinion 84, issued in November of 1953 and published without comment in 16 TEXAS BAR JOURNAL 701 (1953). A recent New York State Bar Association Opinion (Opinion 328 issued 3-18-74) holds it unethical for a lawyer engaged in private practice to record conversations with any persons without their consent.

Authority as to recording by lawyers of conversations of "other persons," except for the New York Opinion just rendered, is scant, and the legal position less clear. Federal and state laws and FCC regulations are in conflict[1] and do not settle the ethical questions involved.

Two California bar opinions, (Los Angeles Opinion 272 and California State Bar Association Opinion 1966-5) held that because of the public policy adopted by the FCC in requiring the use of the "beep tone" in order to inform all parties that a recording is being made, and because a telephone user who violates FCC regulations may be enjoined from such practice or may have his telephone service disconnected, it would be unethical for an attorney to record a telephone conversation without the use of a warning device.

While the law is not clear or uniform as to recording by lawyers of conversations of "other persons," it is difficult to make a distinction in principle. If undisclosed recording is unethical when the party is a client or a fellow lawyer, should it not be unethical if the recorded person is a layperson? Certainly the layperson will not be likely to perceive the ground for distinction.

At least by analogy to Formal Opinion 150, secret recording by attorneys of conversations of *any persons* is unethical even though legal under federal law.

Present Canon 9 of the Code of Professional Responsibility, *A Lawyer Should Avoid Even the Appearance of Professional Impropriety*, expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession, for all attorneys.

DR 1-102 (A)(4) of the Code of Professional Responsibility states that, "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This disciplinary rule is substantially equivalent to, but somewhat broader than, Canon 22 of the former Canons of Ethics which imposed on an attorney an obligation to be candid and fair "before the Court and with other lawyers." Informal Opinions C-480, 1008, and 1009 rely on Canon 22.

Canons 1, 4, 7 and 9, and Ethical Considerations all clearly express axiomatic norms for attorney conduct. Each in the view of the Committee supports the conclusion that lawyers should not make recordings without consent of all parties. Ethical Considerations EC 1-5, EC 4-4, EC 4-5, EC 7-1, EC 9-2 and EC 9-6 all state in various ways the conduct to which lawyers should aspire. None would condone such conduct. The conduct proscribed in DR 1-102 (A)(4), *i.e.*, conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the Committee concludes that no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis. It should be stressed, however, that the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law enforcement officer in making such a recording ethical.

4 FORMAL OPINION 337 (AUGUST 10, 1974)

1. *Federal Law.* It is not a federal offense to make secret recordings of conversations without disclosure. Sections 2510-20 of the Omnibus Crime Control and Safe Streets Act of 1968 were adopted specifically for the purpose of clarifying the existing law governing the interception of wire and oral communications. Section 2511 provides:

"It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication, or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . (or) any other injurious act." 18 U.S.C.A. §2511.

Special provision is made for the recording of privileged communications in §2517 (4) which states:

"No otherwise privileged wire or oral communication intercepted in accordance with or in violation of the provisions of this Chapter shall lose its privileged character."

As interpreted by the Supreme Court in *U.S. v. White*, 401 U.S. 745 (1971), §2510-20 of the Omnibus Crime Control Act permits a participant in a conversation to record a conversation and to use a device for transmitting the conversation to a third party, or may consent to letting a third party use a device to overhear the conversation. The Court stated that:

"Our opinion is currently shared by Congress and the Executive Branch. Title III Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U.S.C. §2510 et seq., and the American Bar Association. Project on Standards for Criminal Justice Electronic Surveillance §4.1 (Approved Draft 1971)."

This statement is vulnerable in that it equates the very broad provision of §2510-20 with the ABA Project, §4.1, which pertains only to the use of electronic surveillance by law enforcement officers.

Furthermore, §5.11 of the ABA Project recommended that "no order should be permitted authorizing or approving the overhearing or recording of communications over a facility or in a place primarily used by licensed physicians, licensed lawyers . . . unless an additional showing as provided in §5.10 is made."

However, the Court in *White* distinguished and refused to overrule *Katz v. U.S.*, 389 U.S. 347, which in effect required a search warrant before the F.B.I. could intercept a telephone conversation.

Since only four justices joined in the reasoning of the plurality opinion, the question cannot be considered closed so far as police cases are concerned.

2. *State Laws.* The majority of states follow federal law as to participant recording of conversations, but at least ten states require the consent of all parties to the recording and impose civil and criminal penalties for violation.

3. *FCC Regulations.* The FCC Regulations, in effect since 1948, require telephone carriers to file tariffs with the Commission to the effect that:

1. Adequate notice be given to all parties that their conversation is being recorded.
2. That such notice be given by the use of an automatic tone warning device.
3. That the tone warning device be furnished, installed and maintained by the telephone company along specified technical guidelines. 11 FCC 1033, 1050, 12 FCC 1005, 1008 (1947).

These regulations are directed toward the telephone carriers, and do not make recording a criminal offense. However, the telephone companies are legally bound by the regulations which reflect the public policy adopted by the Commission concerning the tape recording of private conversations.

A carrier found in violation of the regulations is subject to a fine of $500 for each day of continued violation, and an attorney who fails to use a "beep tone" device, is subject to the discontinuance of his telephone service for violation of the telephone company's tariff. There is no evidentiary sanction against the introduction at trial of recordings obtained without the use of the "beep tone" device. *Battaglia v. U.S.*, 349 F.2d 556 (9th) Cir. (1965), *cert. denied* 382 U.S. 955 (1966).

The position of the FCC is also indicated by its issuance of an order forbidding the use by private citizens of radio devices, which must be licensed by the Commission, to overhear or record conversations unless all parties to the conversation have given their consent. 31 F.R. 3397 (1966).

United States Information Agency

Washington, D.C. 20547

APPENDIX 4

Office of the Director

USIA

December 27, 1983

STATEMENT BY DIRECTOR CHARLES Z. WICK

For a limited time, I recorded a small percentage of my own incoming and outgoing telephone conversations with others, utilizing commercially available equipment. This was done solely to ensure accuracy and facilitate appropriate follow-through on the topics discussed, and for no other purpose. As soon as these few tapes were transcribed, the tapes were erased for further use. The transcript of the conversation was forwarded to the appropriate staff person for action and follow-up. I often advised the caller that I was recording the conversation or a portion of it, but in haste, I did not do this consistently. When concerns about this practice of taping were raised by my staff, I recognized that in my desire to ensure accuracy and promote the mission of the Agency I may have been insufficiently sensitive to concerns some may have about the practice of recording telephone conversations; accordingly, I discontinued the practice.

Throughout my tenure as Director, I have memorialized my own thoughts and the thoughts of others on a dictaphone and distributed transcripts of these tapes to my staff for appropriate action. The recording of some of my telephone conversations was an outgrowth of that practice. Both were a convenient substitute for my taking notes during conversations. I will continue to record such thoughts, but will not use the direct recording of anyone else's conversations.

The practice of recording one's own telephone conversations is not illegal, but upon reflection I can understand how some might find it intrusive. I meant no offense to anyone and apologize if any was taken. I was seeking to improve the efficiency of the USIA, but do not want to do anything that would in any way diminish the confidence in the mission of this wonderful organization or the Administration's efforts in its support.

United States Information Agency

Washington, D.C. 20547

Office of the Director

USIA

January 9, 1984

STATEMENT
BY
CHARLES Z. WICK
DIRECTOR, UNITED STATES INFORMATION AGENCY

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.

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News Release

United States Information Agency
Washington, D.C. 20547

USIA

January 9, 1984

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 true 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.

APPENDIX 5

To: GC - M. Sloat
M. Lindburg

USICA

12/22/81

Mr. Hackett:

For your action on installation. Guidance and

D - Tom O'Connor

INFO MEMO

December 17, 1981

MEMORANDUM TO: D - Mr. Charles Z. Wick

THROUGH: C - Mr. John W. Shirley

FROM: MGT - Mr. James T. Hackett
GC - Jonathan W. Sloat
- John A. Lindburg

SUBJECT: Listening-in Device to Record Telephone Conversations

SUMMARY

The Director may record and transcribe telephone conversations if prior consent is obtained from all parties for each conversation. All consents should be recorded and transcribed.

DISCUSSION

At our meeting today we advised that it is legally permissible to install a device to record telephone conversations, providing the requirements of 41 C.F.R. §101-37.311-3(f) (see attached) are met. We understand that you are considering attaching a listening device to your desk phone, which has a conference capability.

The March 31, 1981 amendments to 41 C.F.R. §101-37.311 (46 Fed. Reg. 19472-74) eliminated the previous requirements for a "Determination of Need" where recordings are to be made only "with the consent of all parties for each specific instance." Therefore, we advised that prior consent to the recording of telephone conversations of all parties must be obtained for each conversation. As agreed at our meeting today, all consents should be recorded and transcribed.

There is no requirement that permission be obtained from GSA or that GSA be informed of the planned recording.

Recording equipment is not sold by the telephone company. The Agency may purchase the equipment from a commercial vendor.

It should be borne in mind that the recordings and transcriptions fall within the scope of the Freedom of Information Act. A request by the public for copies must be granted unless the information fits within one of the narrow exemptions of the Act. There is no requirement that the tapes or transcriptions be retained, but no tape or transcription may be destroyed after it is the subject of an FOIA request.

cc: DD - Gilbert A. Robinson

[From the Federal Register, March 31, 1981]

GENERAL SERVICES ADMINISTRATION

41 CFR PART 101-37 [FPMR AMENDMENT F-47]

Telecommunications Management; Listening-in and/or Recording of Telephone Conversations

Agency.—General Services Administration.

Action.—Final rule.

Summary.—This regulation describes the circumstances under which listening-in or recording of telephone conversations may be performed in Government operations and prescribes policies that limit the practices within the Federal Government. The intended effect is to restrict and control the practice of listening-in recording of telephone conversations.

Effective date.—March 31, 1981.

For further information contact.—Robert R. Johnson, Procurement Policy and Resolutions Branch (202-566-0194).

Supplementary information.—A proposed rule was published in the Federal Register on June 27, 1978 (43 FR 27867), which proposed to severely limit the use of these listening-in and recording devices. As a result of the comments received, FPMR Temporary Regulation F-491 was published to allow listening-in under certain circumstances when approved by the agency head.

Temporary Regulation F-491. Supplement 1 thereto, regarding information that agencies provide to the General Services Administration, are canceled and deleted from the appendix at the end of Subchapter F in 41 CFR Chapter 101. Also GSA Bulletin FPMR F-86 concerning the use of line identification equipment is canceled.

PART 101-37—TELECOMMUNICATIONS MANAGEMENT

1. The table of contents for Part 101-37 is amended to revise one entry and to add six entries as follows:

Sec.
101-37.311 Listening-in or recording of telephone conversations.
101-37.311-1 Definitions.
101-37.311-2 Nonconsensual listening-in or recording.
101-37.311-3 Consensual listening-in or recording.
101-37.311-4 Agency responsibilities.
101-37.311-5 GSA responsibilities.
101-37.313 Use of line identification equipment.

2. Section 101-37.311 is revised and §§ 101-37.311-1 through 101-37.311-5 are added to read as follows:

101-37.311 Listening-in or recording of telephone conversations.

This section describes the limited circumstances under which listening-in or recording of telephone conversations may be performed by Federal agencies and prescribes policies that limit the practice within the Federal Government.

(Note.—The provisions of this § 101-37.311 do not apply to telecommunications monitoring conducted in accordance with Executive Order 12036. Nothing in this regulation shall be construed as authorization for the listening-in or recording of any telephone conversations for the purpose of committing any criminal or tortious act in violation of the Constitution of the laws of the United States.)

§ 101-137.311-1 Definitions.

(a) "Consensual" means that one party to a telephone conversation has given prior consent to the interception or recording of the conversation.

(b) "Nonconsensual" means that none of the parties to a telephone conversation has given consent to the interception or recording of the conversation.

(c) "Listening-in devices" as used in this subpart means such devices that can intercept any telephone communication and be used to listen-in and/or record telephone conversations without the knowledge of one or more of the parties to the conversation.

(d) "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 telephone and/or recorders involved, establishes operating times and an expiration

date, and justifies the use. It is signed by the agency head or the agency head's designee.

§ 101-37.311-2 Nonconsensual listening-in or recording.

Nonconsensual listening-in or recording of telephone conversations shall be authorized and handled in accordance with the requirements of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. 2510 et seq.), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

§ 101-37.311-3 Consensual listening-in or recording.

Consensual listening-in or recording of telephone conversations on the Federal Telecommunications System or any other telephone system approved in accordance with the Federal Property and Administrative Services Act of 1949, section 201(a) (1) and (3) (40 U.S.C. 481(a) (1) and (3)), and implementing regulations thereof is prohibited except under the following conditions:

(a) When performed for law enforcement purposes in accordance with procedures established by the agency head, as required by the Attorney General's Guidelines for Administration of the Omnibus Crime Control and Safe Streets Act of 1968, and in accordance with procedures established by the Attorney General.

(b) When performed for counter-intelligence purposes and approved by the Attorney General or the Attorney General's designee.

(c) When performed by any Federal employee for public safety purposes and when documented by a written determination of the agency head or the designee citing the public safety needs. The determination must identify the segment of the public needing protection and cite examples of the hurt, injury, danger, or risks from which the public is to be protected. Examples of these practices are police and fire department operations, air traffic safety control, and air/sea rescue operations.

(d) When 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 in accordance with appropriate agency records management and disposition systems.

(e) When 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 must be established and adhered to for this type of monitoring. (See § 101-37.311-4 on agency responsibilities for minimal procedures.)

(f) When performed by any Federal employee with the consent of all parties for each specific instance. 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.

§ 101-37.311-4 Agency responsibilities.

Each agency shall ensure that:

(a) All listening-in or recording of telephone conversations as defined in § 101-37.311-3 (c), (d), or (e) shall have a written determination approved by the agency head or the agency head's designee before operations.

(b) Service personnel who monitor listening-in or recording devices shall be designated in writing (see § 101-37.311-3(e)) and shall be provided with written policies covering telephone conversation monitoring. These policies shall contain at a minimum the following instructions:

(1) No telephone call shall be monitored unless the Federal agency has taken continuous positive action to inform the callers of the monitoring.

(2) No data identifying the caller shall be recorded by the monitoring party.

(3) The number of calls to be monitored shall be kept to the minimum necessary to compose a statistically valid sample.

(4) Agencies using telephone instruments that are subject to being monitored shall conspicuously label them with a statement to that effect.

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

(c) Current copies and subsequent changes of agency documentation, determinations, policies, and procedures supporting operations under § 101-37.311-3(c), (d), or (e) shall be forwarded before the operational date to the General Services Adminis-

tration (CPEP), Washington, DC 20405. Specific telephones shall be identified in the documentation and/or determination to prevent any possible abuse of the authority.

(d) Procedures for monitoring performed under § 101-37.311-3(a) (law enforcement) shall contain at a minimum:

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

(2) An emergency procedure for use when advanced approval is not possible;

(3) Adequate documentation on all actions taken;

(4) Records administration and dissemination procedures; and

(5) Reporting requirements.

((e) Requests to the General Services Administration for acquisition approval and/or installation of telephone listening-in or recording devices shall be accompanied by a determination as defined in § 101-37.311-1(d).

(f) A program is established to reevaluate at least every 2 years the need for each determination authorizing listening-in or recording of telephone conversations.

§ 101-37.311-5 GSA responsibilities.

(a) GSA's Automated Data and Telecommunications Service, Office of Policy and Planning (CPEP), will be accountable for information concerning the use of listening-in or recording of telephone conversations in the Federal Government as requested under § 101-37.311-3 (c), (d), and (e).

(b) GSA will periodically review the listening-in programs within the agencies to ensure that agencies are complying with the intent of the Federal Property Management Regulations.

(c) GSA will provide assistance to agencies in determining what communications devices and practices fall within the listening-in or recording category; i.e., those that have the capacity to listen in, monitor, or intercept telephone conversations. GSA will also help develop administrative alternatives to the listening-in or recording of telephone conversations. Requests for assistance shall be addressed to: General Services Administration (CT), Washington, DC 20405.

(d) GSA will take appropriate steps to obtain compliance with this regulation if an agency has not documented its devices in accordance with this section.

3. Section 101-37.313 is added to read as follows:

§ 101-37.313 Use of line identification equipment.

Line identification equipment may be installed on FTS telephone facilities to assist Federal law enforcement agencies to investigate threatening telephone calls, bomb threats, and other criminal activities. No invasion of privacy is involved, and the use of this equipment does not violate the Privacy Act of 1974 or any Federal or State wiretap laws; e.g., title III of the Omnibus Crime Control and Safe Streets Act of 1968. Information and assistance may be obtained from General Services Administration (CT), Washington, DC 20405.

(Sec. 205(c), 63 Stat. 390; U.S.C. 486(c))

Dated: March 6, 1981.

RAY KLINE,
Acting Administrator of General Services.

[FR Doc. 81-9636 Filed 3-30-81; 8:45 am]

(Billing code 6820-25-M)

APPENDIX 6

UNITED STATES INFORMATION AGENCY,
Washington, D.C., January 20, 1984.

Messrs. CHARLES BERK and BARRY SKLAR,
Professional Staff Members, Committee on Foreign Relations, U.S. Senate, Washington, D.C.

DEAR CHUCK AND BARRY: This responds to your letter dated January 12, 1984 and supplements our extensive discussions over the past weeks regarding the taping by USIA Director Charles Z. Wick of various telephone conversations without securing the consent of the other party thereto.

As you know, this issue was precipitated by the presentation to Director Wick of a Freedom of Information Act request on December 26, 1983 by William Safire, a columnist for the New York Times. This FOIA request sought:

"CZW Daily Notes" from 5 November 1980 to 26 December 1983;

Additional transcripts of telephone conversations typed in the office of the Director between Mr. Wick and other parties, prepared by Peggy Gugino, her predecessors, and any temporary replacements for the period stated above; and

All audio tapes made by Mr. Wick in the office and out of the office from which transcripts have been made.

Upon being informed of this FOIA request, the Office of the Director, at the bequest of his Executive Assistant, Robert Earle, sought to secure all documents which would—or could conceivably be—the subject of this request. These materials were all assembled in one location. At that time I spoke with the staff regarding the legal requirements which, with the presentation of a FOIA request, become operative. The materials were taken from the files of various special assistants and clerical employees. They had not been filed in an integrated way, making retrieval of specific items difficult.

Having been assembled, the materials were organized into a master chronological file containing all notes, transcripts and other items generated during the Director's tenure. Having been thus assembled, the files were culled to eliminate duplication. They were further reviewed to extract transcripts and what could be determined to be materials extracted from transcripts. Notes of conversations were also extracted. These materials were wholly unedited.

On January 9, I turned over to you transcripts of 81 conversations, transcripts of stenographic notes taken on 83 conversations and a memorandum of conversation deriving from a recorded transcript of a conversation between the Director and former President Carter. In addition, on that day I delivered four dictaphone tapes of conversations to the House Committee on Foreign Affairs. I understand that you have since been afforded the opportunity to listen to those as well. These are the materials responsive to your request derived from the several thousand pages comprising a master compilation.

I have not provided to the Committee the notes of the Director, considering these to be his own personal papers, not Agency records. As you by now realize, Director Wick uses a recording device much as you or I might make handwritten notes to ourselves. It is an efficient way to create lists which might serve as reminders, to generate notes which will be sent to subordinates to assure appropriate followup, and to provide the raw material for memoranda to memorialize events or to precipitate staff action. From the raw notes dictated by the Director, various action items were generated. These, and the follow-up to them, constitute Agency records which are dealt with in due course: generated, retained and disposed of in accordance with applicable record retention regulations. Such records deal with the full range of Agency activities and are, of course, available to the Committee in the proper exercise of its oversight function.

I hope this is helpful to assist you in understanding what materials were assembled following the receipt of the Safire Freedom of Information Act request, our procedures for culling from those the materials responsive to the Committee's request, and what has not been provided to you—and why.

I do realize that you have also asked for copies of material released pursuant to the Freedom of Information Act. We have yet to make a final determination as to what materials will be so released. When that is done, I will assure that copies are provided to you.

With best regards.
Sincerely,

THOMAS E. HARVEY,
General Counsel and Congressional Liaison.

APPENDIX 7

GENERAL SERVICES ADMINISTRATION,
OFFICE OF INFORMATION RESOURCES MANAGEMENT,
Washington, D.C., January 20, 1984.

Hon. CHARLES Z. WICK,
Director, U.S. Information Agency,
Washington, D.C.

DEAR MR. WICK: The General Services Administration (GSA) is responsible for ensuring that agency officials and employees comply with government-wide regulations for the management and use of Federal telephones and records.

We have completed a review of your recording of telephone conversations in your official capacity as Director of the United States Information Agency (USIA). Enclosed is a report of our findings. We have concluded that USIA has failed to implement properly the Federal Property Management Regulation (FPMR 101-37.311) relating to the listening-in and recording of telephone conversations.

I am, therefore, requesting that you direct USIA's Designated Senior Official for Information Resources Management to perform the following actions to ensure future compliance with the regulation:

1. Establish and publish agency-wide policies and procedures for the listening-in and recording of telephone conversations at USIA;
2. Prepare a written determination for all consensual listening-in or recording of telephone conversations performed at USIA, except those for law enforcement and counter-intelligence purposes;
3. Establish a program to reevaluate at least every two years the need for each determination authorizing the listening-in or recording of telephone conversations as required by FPMR 101-37.311-4(f);
4. Require that a log be kept of all recorded telephone conversations falling under FPMR 101-37.311-3(f), and that all parties involved be provided with a transcript of the conversations;
5. Require that agency personnel use, safeguard, and destroy recorded telephone conversations in accordance with appropriate General Records Schedules and agency records management and disposition principles;
6. Provide to the General Services Administration for approval all requests for the acquisition and/or installation of telephone recording devices, which are intended to be used for recording telephone conversations, along with a written determination as to their need; and,
7. Notify the Administrator of General Services of the actions taken to implement these recommendations.

The Archivist of the United States is conducting a separate review to ensure USIA's compliance with the Federal regulations pertaining to records management. After the National Archives and Records Service completes its review, Dr. Warner and I will discuss if any further action is required on this matter.

I would like to take this opportunity to thank your staff for their courtesy and cooperation during our review of this matter.

Sincerely,

FRANK J. CARR,
Assistant Administrator.

Enclosure.

A REPORT ON THE RECORDING OF TELEPHONE CONVERSATIONS AT THE UNITED STATES INFORMATION AGENCY DURING THE PERIOD OF 1981 THROUGH 1983

(By the General Services Administration Office of Information Resources Management—January 20, 1984)

INTRODUCTION

The Administrator of General Services under the Federal Property and Administrative Services Act of 1949, section 201 (40 U.S.C 481) and the Federal Records Act (44 U.S.C. 2901 et seq.), as implemented in Federal Property Management Regulations (FPMR) 101-37 and 101-11, is responsible for ensuring that agency officials and employees comply with government-wide regulations for the management and use of Federal telephones and records.

We undertook our review to determine if the recording or monitoring of telephone conversations by the Director of the U.S. Information Agency (USIA) violated Federal regulations, and if so, what should be done to prevent this situation from recurring. Our review was conducted by interviewing USIA officials and reviewing the transcripts of the recorded telephone conversations. USIA provided copies of the transcripts to both the Senate Foreign Relations Committee and the House Foreign Affairs Committee on January 9, 1984.

Federal Property Management Regulations 101-37.311 describes the limited circumstances under which listening-in or recording of telephone conversations may be performed by Federal employees and prescribes policies that limit the practice within the Federal Government. Consensual [1] listening-in or recording of telephone conversations on the Federal Telecommunications System or other approved telephone system is prohibited except under the conditions outlined in FPMR subsection 101-37.311-3. Briefly summarized these conditions are:

1. When performed for law enforcement purposes;
2. When performed for counter-intelligence purposes;
3. When performed for public safety purposes;
4. When performed by a handicapped individual to fully perform official duties;
5. When performed for service monitoring; and,
6. When performed by an employee with the consent of all parties for each specific instance.

In some instances the agency head or his designee must be informed about the capability for listening-in or recording of telephone conversations, and a written determination specifying the operational need for its use may be required.

FINDINGS

Since 1981 it has been the practice of the USIA Director to record selected incoming and outgoing telephone conversations. This practice was discontinued on December 23, 1983. There is no way to determine accurately how many calls were recorded, when the calls were recorded, or the parties involved since no logs of the calls were maintained and the recordings and transcripts were routinely discarded.

The Director used several different methods to record telephone conversations:

1. A member of the Director's immediate staff would transcribe the conversation while listening-in either on an extension phone or by being present in the Director's office when he used a speakerphone device;
2. The Director used a recording machine to record conversations being conducted over a speakerphone device or by inductive pickup; and,
3. The Director had a recording device hard-wired to his office telephone that could be activated to record conversations. The equipment was purchased from a commercial vendor and required telephone company installation. The device was installed in January 1982, and was disconnected by USIA officials in July 1983.

After conversations were tape recorded the tapes were given to a secretary for transcription. Once transcribed the tape was returned to the Director for reuse and the transcript was given to the Director's executive assistant to identify action items. The action items, whether from tapes or stenographic notes, were summarized, assigned to USIA personnel and this information was entered into the executive assistant's personal tracking system. When all the action items contained on a transcript were completed, the transcript was discarded. USIA personnel consider that the transcripts are working notes used by the Director to extend the reach of his memory and to convey information for follow-up staff action. The documents generated by the staff as a result of the action items are considered the official agency record by USIA. USIA officials said the transcripts were made available only to the Director's immediate staff and were not provided to other USIA employees or to anyone outside of the agency.

USIA personnel, early on, orally advised the Director that he must obtain prior consent from all parties before recording telephone conversations. When the Director requested that a recording device be hard-wired onto his telephone, the USIA General Counsel wrote a memorandum to the Director dated December 17, 1981, specifically stating that:

"The Director may record and transcribe telephone conversations if prior consent is obtained from all parties for each conversation. All consents should be recorded and transcribed."

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[1] Consensual means that one party to the telephone conversation has given prior consent to the interception or recording of the conversation.

This memorandum, however, failed to inform the Director that allowing others to listen-in on telephone conversations is prohibited by Federal regulation unless there is consent by all parties for each specific situation (FPMR 101-37.311-3).

There are 81 transcripts of telephone conversations tape recorded by the Director. They cover a period between July 1981 through September 1983. Also, there are 83 stenographic notes taken by the Director's secretary when he was on the telephone. These notes are from May 1982 through December 1983. From our review of the transcripts and recordings, we were able to ascertain in only a very few instances that permission to record and/or listen-in on telephone conversations was obtained. However, it should be pointed out that the transcripts and recordings often do not contain complete conversations; therefore, permission may have been obtained but not recorded or recorded but not transcribed. USIA officials agree that some recording and/or listening-in of telephone conversations was done by the Director without prior consent of all parties involved.

Currently, there is some recording of telephone conversations at USIA. Reporters for the Voice of America telephone in their news stories which are recorded for future broadcasts. The Operations Center, which is manned 24 hours a day by the Principle Duty Officer, previously recorded telephone conversations and messages. This practice was discontinued in December 1983. The Operations Center personnel are seeking a legal opinion from their General Counsel as to whether they may record telephone conversations and messages. GSA was never informed about these telephone recording operations because USIA officials said the recordings are performed with the consent of all parties in accordance with the provisions of the regulation.

CONCLUSION

USIA failed to implement properly the regulation relating to the listening-in or recording of telephone conversations (FPMR 101-37.311). The staff did not officially inform the Director of the FPMR provisions until December 17, 1981, even though they were aware that his actions were inconsistent with the regulation as early as July 1981. After being informed, the Director continued to act contrary to the regulation until December 23, 1983, by listening-in and/or recording telephone conversations without prior consent of all parties involved.

APPENDIX 8

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

January 19, 1984

TO : Senate Committee on Foreign Relations
Attention: Chuck Berk

FROM : American Law Division

SUBJECT: Questions Relating to California and Florida Wiretap Laws

This will respond to your request of January 17, 1984, and our subsequent telephone conversation of the same day. Specifically, you ask for the state of the law in two fact situations: (1) a two-party telephone conversation between individuals in California which is taped by one party without the consent or knowledge of the other; and (2) a two-party telephone conversation taped by a party in Florida conversing with a party in another jurisdiction who is unaware of such taping. In these situations you ask for a legal opinion as to the state of the law under California and Florida statutes respectively.

For the purpose of this analysis it is assumed that the party taping the telephone conversation does not do so in the course of legitimate law enforcement duties and that no warrant was secured prior to the taping. It is also assumed that the taping is accomplished without physical or electrical intrusion into the telephone wires themselves but is the product of external monitoring equipment. The presumption is made that the recording was not accomplished for a criminal purpose. Time constraints necessarily limit the scope of this analysis, but an effort has been made to reach tentative conclusions based upon the state statutes and available case law regarding the conduct described in your fact situations.

California

The California Penal Code outlaws such taping save where all parties to the conversation have consented. Section 632 provides, inter alia:

> Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device,[1] eavesdrops upon or records such confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the State prison, or by both such fine and imprisonment in the county jail or in the state prison... Cal. Penal Code § 632(a) (West 1982) (Emphasis supplied).

A harsher penalty is provided for a second conviction. A "person" under this section is defined by the Statute to include "an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state or local." That definition specifically excludes "an individual known by all parties to a confidential communication to be overhearing or recording such communication." Cal. Penal Code § 632(b)(West 1982).

An element of the offense is that the communication be "confidential" within the meaning set out in the law. The term "confidential communication" is defined to include "any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties." Cal. Penal Code § 632(c)(West 1982) (Emphasis supplied). Excluded are "circumstances in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (Id.)

The statute has been upheld in a challenge for vagueness, and in so holding, a California Court of Appeals said in People v. Wyrick, App., 144 Cal. Reptr. 38 (1978):

> The question raised by the trial court whether the Statute makes it a crime to secretly record a conversation, which the recorder could hear, remember, and later have stenographically recorded from memory and notes, must be answered in the affirmative. The statute makes it a crime to secretly record, not to remember, take notes, or later stenographically summarize that recollection. (at 41).

"A participant to a telephonic commnication is exempted from the prohibition against recording the communication only if the other participant knows that it is being recorded." People v. Suite, App., 161 Cal. Rptr. 825 (1980). See also, Forest E. Olson, Inc. v. Superior Court in and for the County of Los Angeles, App., 133 Cal. Rptr. 573 (1976).

The rationale behind the prohibition was detailed by the California Court of Appeals in Warden v. Kahn, App., 160 Cal. Rptr. 471 (1980):

> While it is true that a person participating in what he reasonably believes to be a confidential communication bears the risk that the other party will betray his confidence, there is as one commentator has noted a "qualitative as well as quantitative difference between secondhand repetition by the listener and simultaneous dissemination to a second auditor, whether that auditor be a tape recorder or a third party." [Van Boven, Electronic Surveillance in California: A Study in State Legislative Control, 57 Cal. L. Rev. 1232 (1969)]. In the former situation the speaker retains control over the extent of his immediate audience. Even though that audience may republish his words, it will be done secondhand, after the fact, probably not in entirety, and the impact will depend upon the credibility of teller. Where electronic monitoring is involved, however, the speaker is deprived of the right to control the extent of his own, firsthand, dissemination... In this regard participant monitoring closely resembles third-party surveillance; both practices deny the speaker a most important aspect of privacy of communication—the right to control the extent of first instance dissemination of his statements [Id.] In terms of common experience, we are likely to react differently to a telephone conversation we know is being recorded, and to feel our privacy in a confidential communication to be invaded far more deeply by the potential for unauthorized dissemination of an actual transcription of our voice. (at 476-477).

In summary, it would appear that under the limited fact pattern which you have described, a violation of California law would result.*/ The key elements for an offense under the California statute are that the taping be (1) intentional, (2) of a conversation for which there is an expectation of privacy, and (3) without the consent of the other party.

Florida

Florida law provides that any person who "willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication... shall be guilty of an felony of the third degree." Fla. Stat. Ann. § 934.03 (1983). "Wire communications" are defined by the law as:

> ...any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications. Fla. Stat. Ann. § 934.02(1)(West 1983).

"Interception" is defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other

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*/ Note that California law provides that any person who has been injured by a violation of the wiretapping provisions "may bring an action against the person who committed the violation for the greater of the following amounts:
(1) Three thousand dollars ($3,000).
(2) Three times the amount of actual damages, if any, sustained by the plaintiff."

Cal. Penal Code § 637.2 (West 1982).

device." Fla. Stat. Ann. § 934.02(3)(West 1983).*/ The term "person" covers "any individual." Fla. Stat. Ann. § 934.02(5)(West 1983).

An exception is provided under Florida statutes making it lawful "for a person to intercept a wire or oral communication when all of the parties to the communication have given prior consent to such interception." Fla. Stat. Ann. § 934.03(d)(West 1983) (Emphasis supplied). Thus Florida, like California, does not provide the so-called "one party consent exception" found under federal law. (See 18 U.S.C. 2511(2)(d)).**/ A Florida court has therefore concluded that "the Florida act evinces a greater concern for the protection of one's privacy interests in a conversation than does the federal act." State v. Tsavaris, 394 So. 2d 418, 422 (Fla. Sup. Ct. 1981), remanded, 414 So. 2d 1087.

In Tsavaris the Florida Supreme Court held the recording of telephone conversation without the other party's consent to violate the statute. The court said: "Florida law mandates that while a person who engages in a telephone conversation runs the risk that another may later testify as to the contents of that communication, he can at least be assured that the conversation will not be recorded without his consent." (at 424). The court made it clear that the recording of a telephone conversation constituted an "interception" within the meaning of the wiretap statute. (at 423). See also, State v. News-Press Pub. Co., 338 So. 2d. 1313, 1316 (Fla. Dist. Ct. App. 1976).

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*/ Aural acquisition "means gaining control of possession of a thing through the sense of hearing." See Webster's third New International Dictionary (1961, unabridged), quoted in State v. Tsavaris, 394 So. 2d 418 (Fla. Sup. Ct. 1981).

**/ Florida also provides for recovery of civil damages. One who has been unlawfully intercepted may be entitled to recover actual damages (not less than liquidated damages of $100/day for each day of violation or $1,000, whichever is higher), punitive damages, and reasonable attorney's fees and litigation costs. Fla. Stat. Ann. § 934.10 (West 1983).

We have found no case law specifically addressing questions regarding the locus of the offense. But it would appear that as the offense is the "interception" of the communication, and as the recording in this instance constitutes that "interception", that such recording accomplished in Florida would subject the recording party to the criminal penalties set out in Florida law. Thus under the facts posed here, the taping would violate Fla. Stat. Ann. § 934.03, regardless of the fact that the other party to the conversation was in another jurisdiction at the time.

It thus appears that the fact pattern for the Florida taping, like the California scenario, constitutes conduct which would be prosecutable under the State's communications laws.

We hope this information is helpful. If we can be of further assistance, please let us know.

Kent M. Ronhovde
Legislative Attorney
American Law Division
January 19, 1984

The Washington Post

DATE: 2-4-84
PAGE: A-3

Panel Report Criticizes Wick for Recording Calls

By Howard Kurtz
Washington Post Staff Writer

The House Foreign Affairs Committee said yesterday that U.S. Information Agency Director Charles Z. Wick secretly tape-recorded or had secretaries transcribe "at least 50 percent" of his office telephone calls until he ended the practice in December.

Wick, who apologized for the practice last month, had said that he taped "only a small percentage" of his calls without permission of the other party.

The committee's staff report recommended that Chairman Dante B. Fascell (D-Fla.) tell Wick in a letter that the taping "represented a serious lapse in judgment and was clearly bad public policy." Fascell said that the practice, while not illegal, was "clearly unethical."

The panel estimated that more than half of the calls that were recorded or transcribed involved secretaries taking notes on an extension, with the rest tape-recorded.

After reviewing 84 transcripts and four tapes turned over by the USIA, the panel said that the conversations "were recorded almost entirely without the consent of the other party," except for four cases in which Wick mentioned taping after it began.

While the report said that some witnesses recalled that Wick had asked their consent before taping, it said that Wick acknowledged that he sought such consent "very rarely."

"The subject matter in the recordings primarily covered USIA business" and only a few references to personal matters, the report said. In denying a Freedom of Information Act request for the transcripts this week, the USIA contended that all of the conversations are "personal."

Asked why personal conversations were recorded and transcribed at government expense, a USIA spokesman said that the practice was similar to scribbling personal notes.

The committee said that it would not release the transcripts, in order to protect the privacy of Wick's callers, whom it said were "a cross section of individuals."

The material is "routine," the panel said, and it "does not reveal any abuse of the director's official position for political or personal gain, nor does it contain any statements which would compromise the integrity of the agency."

The USIA spokesman said that all agency taping is being reviewed to ensure compliance with federal rules.

Wick told the committee that he did not take seriously a federal regulation against surreptitious taping because "it had no teeth."

(14)

DATE: 4-27-84
PAGE: A-27

The New York Times

Wick Making History

By William Safire

WASHINGTON, April 26 — "He told me that he was doing it for his memoirs," said U.S.I.A. Director Charles Wick's former secretary on NBC's "Today" program, recounting her boss's secret taping of telephone calls in California while raising money for the 1980 Reagan campaign.

Natalie Bellick recalled Mr. Wick boasting "that what he was doing was a part of history, and he was living through it and he would appear in the history books. I felt it was unethical. I didn't know it was illegal until I read about it in the paper."

Up to now, all we have heard about Director Wick's motive in surreptitiously recording hundreds of his calls was his insistence that it was merely for note-taking efficiency. For the first time, somebody who worked for him has stated the obvious: that a secretly taped record of conversations with the leading lights of the Reagan Administration would form the basis of a much-sought-after memoir. The tape-memoirist would gain not merely fame, but fortune.

Miss Bellick came forward when it was reported that the Los Angeles District Attorney, Robert Philibosian, had decided to look into whether the U.S.I.A. Director may have broken a state law when he secretly taped a reporter in California on July 8, 1981, as a Senate report suggested.

In Washington D.C. such secret taping by a Federal official violates Government regulations, but Mr. Wick has gone unpunished. In Florida, where Mr. Wick attached a suction-cup microphone to his phone receiver to tape long-distance calls to his Administration colleagues, the District Attorney of Palm Beach declined to prosecute.

In California, however, Section 632 of the Penal Code says that "every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops on or records" that conversation is subject to a fine up to $2,500 and up to a year in jail.

Mr. Wick is likely to argue that his call to a Los Angeles Times reporter carried no expectation of confidentiality: ". . . if the person I am talking to expects to make a record of what we're discussing," he told a House committee, "that would be different [from a confidential call]."

What is really different is the fact that some law enforcement agency is finally investigating the secret-taping career of Charles Wick. Over 80 tape transcripts have been unearthed; 300 but no one has been questioned under oath about knowledge of tapes that may have been made, destroyed or concealed.

The Los Angeles probe must concentrate on acts committed in California. The three-year statute of limitations may already have run on tapes made during the 1980 campaign, and if any charge is to be made on the 1981 call, it would have to be made before July 8 of this year.

Assistant District Attorney Reuben Ortega expects to interview the U.S.I.A. Director in mid-May, on one of Mr. Wick's trips to his home state. A key question: Any other California calls? Investigators should obtain from Mr. Wick's office the dates when he was in California during the last three years. Then they should talk to Miss Bellick's parade of successors — the names of six here in Washington are readily available — who would have transcribed the cassettes brought back to Washington by Mr. Wick.

The purpose of such inquiry would be to determine if any California calls — other than the one spotted by the Senate — were taped secretly and transcribed. If so, were such tapes or transcripts destroyed — and if so, by whom, when, and on whose orders?

When a New York Times colleague and I began this line of questioning last Dec. 26, Mr. Wick threw us out of his house. Asked during that interview if he had been warned by his legal counsel against taping without permission, and had subsequently examined the laws, he replied: "I guess so, yeah. As it were, it was illegal without the person's permission." Asked if he had taped in Florida, he answered "no" (which turned out to be untrue). Asked about California, he said "Not without permission." He seemed reluctant to deny outright any taping in California. I think his sensitivity to that taping was the reason he then said: "If you don't mind, I think I'll terminate this right now. I don't have counsel here."

Why pursue one crony-appointee who willfully ignored toothless regulations and may have broken a law? Because the Wick furor caused the introduction of H.R. 4620, which has just been reported out of Government Operations Committee, and of S. 2205, soon to come before Senate Judiciary; passage of this legislation would make taping of unsuspecting citizens by a Federal official a Federal crime.

Charlie Wick, nursing home operator and husband of Mrs. Reagan's best friend, wanted to be part of history; if "the Wick bill" passes to pro-

THE ~~WHITE~~ HOUSE
WASHINGTON

Date _____

Suspense Date _____

MEMORANDUM FOR: _____

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

_____ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

_____

_____

_____

_____

What's New

by Allan Ashman

Florida court suppresses tape recording of murder

FLORIDA'S Fourth District Court of Appeal reluctantly has suppressed as evidence a victim's tape recording of his own murder—the only evidence in the case—because it violated a state statute barring the unconsented interception of oral communications by one party to a two-party conversation.

The court was confined by the Florida Supreme Court's precedent in *Florida v. Walls*, 356 So.2d 294 (1978), but Judge Hersey, writing for a unanimous panel with Chief Judge Anstead and Judge Downey, certified the case to the supreme court as one presenting a question of "great public interest."

Evidence was presented at the suppression hearing that officers investigating an apparent homicide found in the victim's office a tape recorder containing a tape of a conversation between the defendant and the victim concerning a business deal gone bad. The sound of five gunshots, moaning and, according to the court, sounds like the "gushing of blood" abruptly ended the conversation. The victim's body had five bullet wounds.

The trial court denied the defendant's motion to suppress the tape and sentenced him to life imprisonment.

Attempting to influence the Supreme Court's ultimate decision, Judge Hersey carefully distinguished the *Walls* decision, in which the state conceded that the communication constituted an "interception," a term used in the statute but not defined. He argued that ascribing the customary meaning to the word would change the result when a recording is made by one party to a two-party conversation without any intervention by a third party.

Judge Hersey noted that the statute defines "oral communication" as something "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." Drawing on the case law regarding the reasonable expectation of privacy, he suggested that the defendant's intent to harm the victim obliterated any expectation of privacy he might have had; the privilege "dissolved in the sound of gunfire."

In *Walls* the state still had a case after suppression of the tape—the victim was alive to testify. But in this case, Judge Hersey noted, the state was without a case. "No matter how pernicious the 'crime' of non-consensual recording of a conversation may seem to appear," he remarked, "the crimes of homicide and extortion must certainly be considered vastly more heinous. To prohibit the former by imposing a felony penalty is one thing; to inhibit prosecution of the latter by adding an exclusionary rule is quite another."

(*Inciarrano v. Florida*, March 14, 1984, 447 So. 2d 386.)

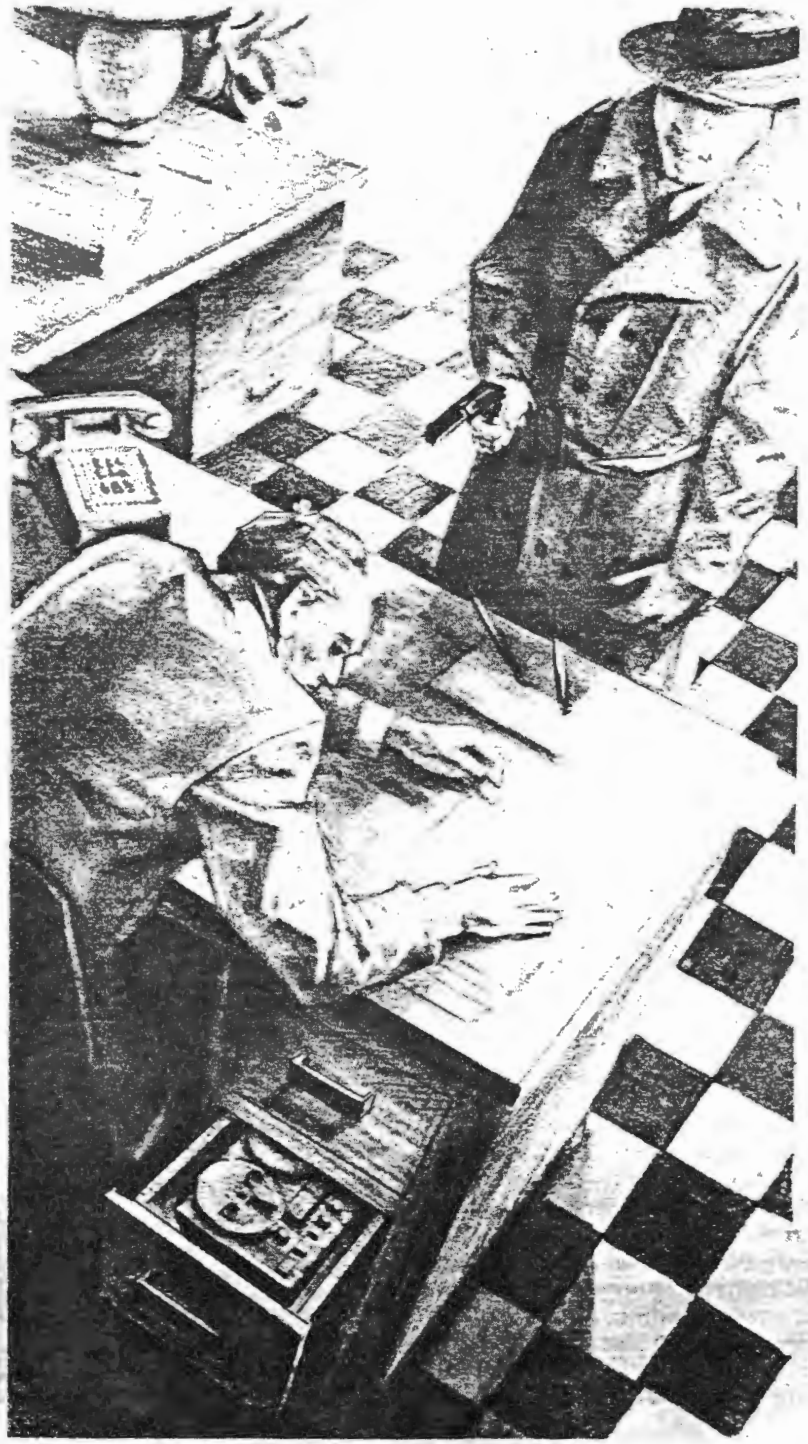

Illustration by Gary Gianni