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SUSPENSE

6 March 84
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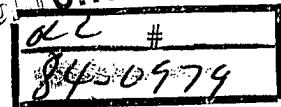
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503



SPECIAL

March 5, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

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

SUBJECT: Draft Justice (Keeney) statement on H.R. 4826, a bill concerning nonconsensual recordings of telephone conversations

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

COB TUESDAY, MARCH 6, 1984.

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


James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: A. Curtis M.A. Chaffee M. Uhlmann M. Horowitz
F. Reeder A. Donahue F. Fielding

DRAFT

STATEMENT

OF

**JOHN C. KEENEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION**

BEFORE

THE

**SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

CONCERNING

NONCONSENSUAL RECORDINGS - H.R. 4826

ON

MARCH 8, 1984

Mr. Chairman and members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on H.R. 4826, a bill which would make it a criminal offense for a public officer or employee to record a telephone conversation without the consent of all the parties to the conversation. The bill would have a substantial adverse impact on investigations necessary in law enforcement, would put an additional strain on prosecutive resources, and would criminalize a number of useful practices in other areas. For these reasons the Department of Justice opposes its enactment. While I will be primarily addressing these aspects of the bill, I note that it also raises important issues for the agencies of the federal government which engage in intelligence operations and witnesses from the intelligence community will be addressing these concerns.

H.R. 4826 would amend title 18 of the United States Code by adding a new section 1924 to prohibit persons "holding office or employment in a nonforeign government" from making sound recordings of voice conversations taking place on telephones without the consent of all parties to those conversations. There are exceptions for government officials who conduct criminal investigations or make criminal arrests, who engage in foreign intelligence and counterintelligence work, who record telephone search warrants, and who suffer from physical handicaps.

The bill represents a radical departure from present law. Subsections 2511(2)(c) and (d) of title 18 operate to exempt one-party consensual interceptions of communications from the

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prohibitory portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et. seq.) unless the interceptor (i.e. the person who secretly records the conversation) (1) is not acting under color of law, and (2) intercepts for a criminal, tortious, or other injurious purpose. Otherwise, there is no federal statute which prohibits the surreptitious, one-party consensual interception of communications. However, the General Services Administration, pursuant to its authority to issue rules relating to the management and disposal of government property,¹ has promulgated regulations concerning the use of the federal telecommunication system. They are found at 41 C.F.R. Part 101-37. A portion of the regulations prohibits one party consensual interceptions with exceptions very similar to those in H.R. 4826. There appears to be only administrative sanctions for violation of this GSA regulation and, consequently, no federal criminal penalty presently exists for a government employee or officer who surreptitiously records his own telephone conversations on government telephones. H.R. 4826 would make this conduct a misdemeanor punishable by one year's imprisonment and a \$100,000 fine.

Our primary concern with this bill is that even with its exception for law enforcement activities, it will inhibit the performance of legitimate investigative and prosecutive responsibilities because several important activities appear to fall outside the exemptions provided. For example, although the bill

¹ See 41 U.S.C. 486(c).

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would permit law enforcement agents to record their own conversations, it would not allow federal employees acting on their own or as an informant for law enforcement officers to record conversations concerning criminal activity. Thus, a federal employee who records a threat, a bribe offer, or an obscene or harassing telephone call would violate the statute. As a matter of fact, the statute would even apply in a situation where a totally honest and dedicated employee concluded from a course of dealing with a private citizen that he was about to be offered a bribe to take some improper action and informed the FBI, if, even with an FBI agent in his office, he recorded the telephone conversation that ensued when the offeror of the bribe called with the proposal. Moreover, because such a recording would have been made in violation of law by the federal official, it might be ruled inadmissible in a federal prosecution of the person offering the bribe. Thus, that person might go free while the employee, who acted only to thwart a crime, would face a potential criminal prosecution and a \$100,000 fine.

Moreover, the bill would criminalize a number of common practices employed in the area of public safety that are not connected with criminal law enforcement. For example, since the bill applies to persons "holding office or employment in a nonforeign government," it would apparently apply to state and local governments. Thus, fire departments and other emergency organizations could no longer record emergency calls as a matter of course.

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In fact, the phrase "holding office or employment in a nonforeign government" is unclear but would appear to apply to a Congressman or a member of his staff who recorded a conversation with a constituent who called seeking help in resolving a complicated social security matter if the staff member forgot to obtain the constituent's consent. Since there is no intent requirement, any such inadvertent violation would be covered.² Another example of such an unintended violation would be failing to obtain the consent of one party to a multi-party conference call to make a recording.

Finally, the coverage of the bill causes a number of inconsistencies. The most significant is its application only to government employees acting in the course of their office or employment. If it is felt that a one-party consensual recording of a telephone conversation by a government official or employee is so harmful as to be deserving of criminal punishment, it is hard to see why businessmen and others in the private sphere who engage in the practice should not also be penalized. We perceive no justification for this singular focus on government recording in the course of employment, inasmuch as the prohibitions of Title III of the Omnibus Crime Control and Safe Streets Act currently extend to private as well as public sector "interceptions". Indeed the phrase "course of such office or employment" would appear even to make the bill inapplicable to a government

² We note that there is also ambiguity in the phrase "non-foreign government" as to the coverage of such places as Puerto Rico, Guam, the Virgin Islands, and American Samoa.

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official who secretly recorded a telephone conversation on his office telephone concerning a matter unrelated to his work, such as a personal business matter, since such a conversation would apparently not be in the course of his employment.

Another inconsistency is limiting the coverage of the bill to telephone recordings while ignoring other very similar conduct such as having a secretary secretly listen in on an extension telephone and take verbatim shorthand notes. The harm or unfair advantage derived from this practice is not appreciably different from making a recording. Moreover, the bill is limited to the "recording of a voice conversation taking place on a telephone." It thus would not reach the equally harmful situation of a person's secretly recording a conversation with a visitor in his office without the visitor's consent or knowledge.

In short, Mr. Chairman, we see many problems with H.R. 4826. As you know, the Congress has labored for years to develop a balanced statutory scheme in the complex and highly technical area of electronic surveillance. Three separate statutes already come into play in this area.³ Any additional legislation must be carefully crafted to comport with that scheme and, in our view, should recognize that there is a considerable difference between the harm caused by a person who secretly records his own telephone conversation and a person who intercepts a conversation

³ In addition to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which I have already discussed, they are the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et. seq.), and 47 U.S.C. 605 which protects the privacy of radio communications.

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without the consent of either party. While we do not in any way condone the former type of conduct, we are not convinced that a criminal penalty is the appropriate response. For example, the occasional government employee who engages in such conduct absent justifying circumstances can be dealt with adequately by regulation or an executive order. A regulation or executive order could provide the appropriate sanction, including dismissal from office, for this activity and yet offer a more flexible approach to the problem than does a criminal statute. Also, a regulation or executive order can be much more quickly altered in response to the changing needs of law enforcement and the intelligence community than could a statute. In fact, as you probably know, an executive order on this subject is presently being discussed within the Administration.

Mr. Chairman, that concludes my prepared statement, and I would be pleased to answer any questions the Subcommittee may have.