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**FEDERAL TELECOMMUNICATIONS
PRIVACY ACT OF 1984**

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HEARING
BEFORE THE
SUBCOMMITTEE ON HUMAN RESOURCES
OF THE
COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 4620

**A BILL TO PROHIBIT THE RECORDING OF CONVERSATION MADE ON
THE FEDERAL TELECOMMUNICATIONS SYSTEM, AND FOR OTHER
PURPOSES**

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FEDERAL TELECOMMUNICATIONS PRIVACY ACT OF 1984

THURSDAY, JUNE 14, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HUMAN RESOURCES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 304, Cannon House Office Building, Hon. Don Albosta (chairman) presiding.

STATEMENT OF HON. DON ALBOSTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. ALBOSTA. The Subcommittee on Human Resources will now consider H.R. 4620, a bill to prevent taping or monitoring of conversations on the Federal Telecommunications System unless authorized by all the persons involved or by law.

When Charles Wick, the Administrator of the U.S. Information Agency, said that he did not consider the General Services Administration antitaping regulations to be law because they had teeth, it became very clear that we needed a more an effective law.

The Human Resources Subcommittee has jurisdiction over rights of privacy of Federal employees, and legislation to make such recording a Federal crime has been reported from other committees.

However, none of the other committees have addressed the problems that Federal employees face in situations where they are taped or monitored, or ordered to monitor the communications of others.

People who believe their privacy rights have been invaded should have effective remedies and Federal employees who have been told to conduct such monitoring should not be exposed to personal liability.

Therefore, the subcommittee will consider whether to provide remedies in court and before the Merit Systems Protection Board.

These would provide protection for innocent Federal employees, and serve as an effective deterrent to the willful and wrongful invasion of privacy and a real remedy for any person whose privacy has been invaded.

We should be able to say to our constituents that we have protected their privacy and given them a means to protect themselves from any government agency that unlawfully threatens their privacy.

It is fitting that we should do this in 1984 as a strong statement that America is still a country where individual rights and freedoms are protected by law.

Representatives of the National Treasury Employees Union and the American Foreign Service Association will testify today. The Justice Department will present the administration position on this legislation. We will also hear from Treasury Department representatives.

Without objection, we will also submit a statement from the Senior Executives' Association for the record.

After each member has had a chance to make a statement, I will recognize our first witness.

Does the gentleman from New York have a statement?

Mr. GILMAN. I have no opening statement, Mr. Chairman. Thank you.

Our first witness will be the Honorable Victoria Toensing, Deputy Assistant Attorney General, Criminal Division of the Department of Justice; and, Ms. Mary Lawton, Counsel for Intelligence, Policy, Department of Justice.

You may proceed.

STATEMENT OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. TOENSING. Good morning, Mr. Chairman.

My name is Victoria Toensing. It is a difficult name, more difficult than Albosta to pronounce.

Mr. ALBOSTA. Yes.

Ms. TOENSING. I want to thank you for asking me to testify here on the administration's views on H.R. 4620.

I have a much longer statement that I have submitted for the record.

Mr. ALBOSTA. We will put all of your written statement into the record.

Ms. TOENSING. Thank you.

I would like to comment for a few moments on H.R. 4620, a bill which criminalizes for only Federal executive branch employees the interception of telephone conversations.

The Department of Justice strongly opposes this legislation for two main reasons: No. 1, it unnecessarily burdens law enforcement since there are presently GSA regulations in effect; and, No. 2, it unreasonably discriminates against the executive branch Federal employee.

Before I discuss these points, let me just briefly state where the law is now regarding the interception of communications, and I refer to title III of the 1968 omnibus crime bill.

In that bill there is a term "intercept," which is not used in this legislation, but we're really referring to such kind of activity.

That definition is very broad, Mr. Chairman. It applies to any reporting or listening to any oral communication, including one to which the person is a party.

Congress recognized this as a very broad definition and, because of that, provided two major exceptions to making it a crime to intercept communications.

The first exception is where the party is acting under color of law. There is no crime if a party is acting under color of law, if he or she is a party to the conversation or a party of the conversation gives consent.

The second exception is where a person is not acting under color of law. Again it is no crime if he or she is party to the conversation or if the party to the conversation has given consent, unless that interception is for the purpose of committing a crime or a tortious act.

In sum, title III exempts one-party consensual interception unless the person is not acting under color of law and intercepts for a crime or a tort.

As you know, H.R. 4620 would amend title I of the 1949 Federal Property and Administrative Services Act by making it a crime for any Federal executive branch employee either, No. 1, to cause or permit a recording or listening in on telephone conversations conducted on the FTS, the Federal Telecommunications System; or, No. 2, performance the same kind of activity when conducting business on any kind of telephone. There are certain exceptions which I will get into in a few moments.

First, let me explain why I think this is a very difficult area to criminalize. We are taking one specific conduct—the listening in or recording of a telephone conversation—and in one instance we are saying to a group of the Federal executive branch employees: this is a crime. And yet, the same kind of conduct for another group of executive branch employees is mandatory for them to fulfill their obligations in law enforcement, in intelligence, in health and safety or in national security.

So it is a very difficult situation when you have about a 50-50 split in situations where you have to do a certain act and, on the other hand, where it is a crime.

Generally, Mr. Chairman, there is an understanding, when people have a conversation that the tone, the inflection, whatever it is that you are talking about will be kept between those two people. But I want to point out that there is no constitutional right to keep the conversation private.

The Supreme Court has said, rather, that intercepting or recording one's own conversation is not an invasion of privacy that violates the fourth amendment. What is being violated in such a situation is a breach of trust between the persons. We have other similar kinds of conduct, Mr. Chairman. For instance, if I told you something in confidence and said please do not tell it, and you told someone else, we would not condone that, but we do not pass a law against it. Such conduct is not a candidate for the Criminal Code.

There are GSA regulations in effect for the executive branch. These cover one party consensual listening in or recording. Procedurally we favor the use of regulations because they provide a flexibility for change instead of waiting for Congress to act. And, substantively, these particular regulations appear to work. These provide the flexibility substantively when the same conduct, either is to be criminalized or performed.

But our second principal objection, Mr. Chairman, is the discrimination against the Federal executive branch employees; only for them is this conduct criminalized.

Certainly, if it is a crime for an employee of the Department of Agriculture, then it should likewise be a crime for a member of the Senate or the House or an employee of the Senate or the House or of the Judiciary. Certainly the harm is the same.

Title III, which this legislation generally covers, applies to everybody. If the proponents of this bill genuinely believe, contrary to the Department's views, that this conduct is so egregious as to subject an executive branch employee to a criminal sanction, I do not see how they could possibly or moreover, logically, not apply that same kind of sanction to everybody.

Mr. Chairman, we previously sent a letter to the chairman of the full committee regarding many of our concerns on this legislation, but let me just briefly summarize a few of them.

There are drafting problems. For instance, there is no intent requirement in this bill. So a person inadvertently picking up the telephone when a conversation is going on has technically violated the act. My secretary commented that concern to me as she was typing up the statement for me last night.

Although the bill says that there is an exception for law enforcement, it really does not sufficiently cover a number of situations where we would have law enforcement needs and where consensual recording would be reasonable and proper.

For example, if a Federal employee suddenly realizes he or she is being offered a bribe, he or she would have to wait before taping it, because he or she would not know if all the regulations and procedures were in effect.

Moreover, take that same situation, where the employee realizes that he or she has been offered a bribe—and I have several criminal cases in mind that I am familiar with, and it is decided the bribe should be monitored. What if that employee, who is not a trained law enforcement person, violates one of these regulations; is then the employee the criminal rather than the briber? And if there were a trial and the Government wanted to use this recording, is it then suppressed because it might be in technical violation of one of these regulations?

There are some real law enforcement concerns with this, Mr. Chairman.

Another problem with the bill is the requirement that all of the recordings or the transcripts of conversations be kept. There is a criminal penalty if they are not kept in accordance with 18 U.S.C. 2071, and the criminal penalty is even more than what this bill provides, 3 years. We now have enhanced the penalty.

This would mean that all conversations recorded for the handicapped, for public safety reasons, fire and ambulance in Federal enclaves would have to be kept and maintained.

Moreover, there is an irony here, Mr. Chairman. If we are truly concerned about a person's privacy, then shouldn't we be wanting to dispose of these conversations that were not to be recorded instead of keeping them forever?

I also question why the bill is limited only to phone conversations. Is it not equally an invasion of privacy, if considered to be so,

to record a person's conversation, to wire a person as it is to wire a telephone conversation?

I don't want my comments about the drafting to be misconstrued. That does not mean we are trying to fix up the bill. The basis of our argument, the basis of our position here is that this is not conduct for criminalizing. It is conduct for us to look at it in the executive branch, to look at the regulations and the particular flexibilities and the House and the Senate would like to do similarly. I would be glad to answer any questions, Mr. Chairman.

[The full statement of Victoria Toensing follows:]

**STATEMENT OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL,
CRIMINAL DIVISION**

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. 4620, the Federal Telecommunications Privacy Act of 1984. The bill would prohibit federal employees from recording or causing a listening-in upon any conversation conducted on the Federal Telecommunications System, or on any other system if the call involves the conduct of government business. As you know, the bill has already been reported by the Committee on Government Operations and my comments today will address the bill as reported by that Committee.

The Department of justice strongly opposes the enactment of this legislation. It would seriously interfere with federal law enforcement and national security efforts without enhancing privacy interests. It also discriminates against federal employees while leaving unaffected identical conduct by other persons. Moreover, the bill contains a number of drafting problems.

BACKGROUND

Many persons confuse the conduct covered by H.R. 4620—the recording of or listening in on a telephone conversation to which a person is a party without the knowledge of the other party to the call—with the very different conduct of "wiretapping," which is the surreptitious listening-in or recording of a conversation without the consent or knowledge of either party to it. The criminal code presently covers wiretapping in some detail, but it does not proscribe the secret recording of a conversation by one party without the knowledge of the other, unless the recording was for a criminal, tortious, or otherwise injurious purpose.

Chapter 119 of Title 18, United States Code, sets out a complete scheme for regulating the interception of wire and oral communications. Because Chapter 119 was originally enacted as Title III of P.L. 90-351, the Omnibus Crime Control and Safe Streets Act of 1968, the law in this area is commonly referred to as "Title III." Title III (18 U.S.C. 2511(1)(a)) makes it an offense to "intercept" any wire or oral communication. The term "intercept" is defined in Title III (18 U.S.C. 2510(4)) as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." Hence although the work "intercept" normally brings to mind a surreptitious overhearing of a conversation without the knowledge or consent of either party to it, the above-quoted definition is so broad that it applies to any recording of a wire or oral conversation including one to which the person making the recording is a party. However, as you may know, Title III was given long and careful consideration by the Congress. As a result it contains two extremely important exceptions which would be altered by this bill.

The first Title III exception (section 2511(2)(C)) states that it is not 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 permission or consent to such interception." The second Title III exception (section 2511(2)(d)) states that it is not unlawful "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 laws of the United States or of any State or for the purpose of committing any other injurious act."

Thus, Title III (subsections 2511(2)(c) and (d)) exempts the recording or listening in on a conversation without the consent of all parties to it from the prohibitions of

Chapter 119 unless the person making the recording (1) is not acting under color of law and (2) intercepts or records for a criminal, tortious, or other injurious purpose. Otherwise there is no federal statute that prohibits the secret recording of one's own conversations.

However, the General Services Administration (GSA), pursuant to its authority to issue government-wide rules relating to the management and disposal of government property set out in 40 U.S.C. 486(c), has promulgated regulations for the use of the Federal Telecommunications System (FTS). 41 C.F.R. 101-37.311 prohibits, with certain exceptions, the one-party consensual recording of conversations on the FTS or any other telephone system approved in accordance with the Federal Property and Administrative Services Act of 1949.

PROPOSED LEGISLATION

H.R. 4620 would amend Title I of the Federal Property and Administrative Services Act of 1949 by adding a new section 113. In essence, the new section would codify the above-mentioned GSA regulations and provide for a criminal sanction of a \$10,000 fine and one year's imprisonment for any federal employee who caused or permitted the recording or listening in upon any telephone conversation conducted on the federal telecommunications system. It would also prohibit a federal employee from causing or permitting the recording or listening in upon any telephone conversation between a federal employee and another person if the call "involves the conduct of Government business." The new offense is set out in subsection 113(a).

Subsection 113(b) exempts from the prohibitions found in subsection (a) the recording of or listening in upon a conversation without the consent of any party to it if the recording or listening in is authorized under Title III, which I have just discussed, or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et. seq.). The purpose of this exemption appears to be to underscore the point that the new section, which applies to the recording or allowing the listening in upon a conversation by one party to it, is not intended to affect the legitimate interception of communications for law enforcement or intelligence purposes which are typically carried out pursuant to a court order without the consent of either party.

Subsection 113(c) permits the recording of or listening in upon a conversation with the consent of one party to it when the recording or listening in is performed (1) for law enforcement purposes; (2) for counterintelligence purposes; (3) for military command instructions; (4) for counterterrorism purposes; (5) for public safety purposes; (6) by a handicapped employee as a tool necessary to that employee's performance of official duties; or (7) for service monitoring purposes.

Subsection 113(d) permits the recording of or listening in upon a conversation with the consent of all parties to the conversation. Included within this category are telephone conferences, secretarial recordings, and other acceptable administrative practices conducted pursuant to strict supervisory controls to eliminate possible abuses.

Subsection 113(h) provides that any recording or transcript of a conversation made under, or in violation of the section shall constitute a record deposited in a public offense for purposes of section 2071 of title 18. That section, in turn, provides that any concealment, removal, or destruction of such a record is punishable by a fine of up to \$2,000 and imprisonment for up to three years.

DISCUSSION

Mr. Chairman, we have previously sent to the Chairman of the full Committee a letter describing our strong objections to H.R. 4620 in some detail. I will briefly summarize our position here. First, the enactment of this bill would cause unnecessary problems in the law enforcement area and would be disruptive of our authorized intelligence and counterintelligence activities. Ms. Lawton, Director of the Department's Office of Intelligence Policy and Review will address the intelligence concerns, but let me describe some of the ways H.R. 4620 would impede our law enforcement efforts.

The bill does contain a provision allowing a one party consensual recording or listening-in for law enforcement purposes. But this exception is so narrowly drafted that it does not cover a number of situations in which a one-party consensual recording would be reasonable and proper. If, for example, a federal employee in good faith surreptitiously records a telephone conversation in which he is offered a bribe, but in doing so violates a procedure established by his agency, he would be in violation of the provisions of the bill. Consequently, a court might suppress the recording and any derivative evidence at the subsequent bribery trial. The law enforcement exception in subsection (c)(1) also does not cover situations in which a federal em-

ployee receives a threatening or obscene telephone call, or a call in which he suddenly realizes he is about to be offered a bribe, and records it in an attempt to provide evidence for use against the caller even though time constraints have precluded his complying with procedures established by his agency for making such a recording.

More important, and even if the law enforcement exception were expanded to cover the above types of situations, the passage of H.R. 4620 would still cause unnecessary burdens for federal law enforcement personnel. Its enactment would be an overreaction to the highly publicized conduct of one federal official—which we in no way condone—but which had nothing to do with law enforcement.

Significantly, the Supreme Court has held that intercepting or recording one's own conversations is not an invasion of privacy that violates the Fourth Amendment.¹ What is involved is, at bottom, a breach of trust that the specific words, tone, and inflection of the conversation are limited to the parties to it, and this breach of trust arguably does not even occur until a recording of the intercepted conversation is played for or furnished to a person not a party to it. Therefore, in our view, Title III struck the correct balance in terms of penal sanctions, in only prohibiting the intercepting of one's own conversations for a harmful purpose.

As a practical matter, we do not believe that a person who recorded his own conversation should be prosecuted as a criminal unless the recording was made to commit a tort or a crime, e.g. to blackmail the other party, the very type of one party consensual interception prohibited by Title III. The recording or listening in on one's own conversations when done for some other purpose is simply not so serious a matter as to justify the diversion of the Justice Department's scarce investigative and prosecutive resources from other offenses. In short, we believe that any harm done by a one-party consensual recording (other than for a criminal or injurious purpose) is not a matter warranting the application of penal sanctions and in the case of an employee of the Executive Branch of the Federal Government is already adequately subject to the application of appropriate administrative sanctions.

Moreover, the bill applies only to a "Federal officer or employee." Proposed section 113(j)(1) provides that "the term 'Federal officer or employee' includes any officer or employee of a Federal agency." Thus it appears that the bill is intended to apply only to employees of the Executive Branch of the government. The bill would apply to an employee of the Department of Agriculture but not, for example, to a Member of Congress, a Congressional staff aide, or a Supreme Court Justice. Nor would the bill apply to a businessman, state official, attorney in private practice, or to anyone else not connected with the federal government. We object to this singling out of federal employees in the Executive Branch for the conduct of recording or permitting a listening in on their conversations (conducted on the FTS System or otherwise discussing government business) while ignoring identical conduct by all other persons. If the proponents of this bill genuinely believe, contrary to our views, that the conduct it proscribes does constitute a serious breach of privacy, justifying the creation of a federal criminal remedy (particularly one with the draconian punishment of forfeiture of public office) then logically any legislation in this area should apply to secret recordings of telephone conversations on any system and by any person, not just Executive Branch employees of the federal government.

Another serious problem with the bill is the requirement in section 113(h) that all recordings or transcripts of conversations made under, or in violation of the section constitute a record which must be retained or disposed of in accordance with the procedures of chapter 33 of title 44. This is potentially a very burdensome requirement. It would mean, for example, that all conversations recorded by handicapped persons and all conversations recorded for public safety purposes—for example police, fire and ambulance calls in federal enclaves—no matter how routine, would have to be treated as records and retained until they could be disposed of in accordance with regulations issued pursuant to chapter 33 of title 44. Moreover, it is inconsistent with the announced objectives of the bill, the protection of privacy, to require that such recordings—for that matter a recording made in violation of the new statute—be retained. True concern for the privacy of individuals would seem to dictate that these recordings should be disposed of as quickly as possible, not filed away in a government office or warehouse.

In addition to these overriding concerns, H.R. 4620 contains additional flaws. We have discussed many of them in the letter to the Chairman of the full Committee. One of the problems, however, warrants discussion here. That is that the new crimi-

¹ See, e.g. *United States v. White*, 401 U.S. 745, 749-750 (1971); *Lopez v. United States*, 373 U.S. 427 (1963).

nal statute which the bill creates does not include a scienter requirement such as a showing that the defendant acted "willfully" or "knowingly." Thus, it would reach even unintentional overhearings such as a person's accidentally turning on a recording device or forgetting to get permission from one party to a multi-party conference call to make a recording.

We also note that the coverage of the bill is limited to recording or allowing the listening in upon telephone conversations. It seems inconsistent to cover only this conduct and not the virtually identical situation of a person secretly recording a face to face conversation.

In sum, we strongly oppose the enactment of H.R. 4620. The bill impacts adversely on legitimate law enforcement and intelligence activities and criminalizes activity that is not deserving of criminal sanctions. The existing GSA regulations adequately cover the recording of or listening in upon telephone conversations by federal employees in the executive branch, and the various agencies are free to adopt and apply appropriate administrative sanctions for their employees who violate them. These sanctions could extend to a dismissal. We think this is an adequate deterrent and punishment for a federal employee who secretly records or allows the listening in upon his own conversation, and that criminalizing this conduct is simply not necessary or appropriate. And, again, we think it is most unfair for legislation in this area to discriminate against employees of the Executive Branch while ignoring secret taping or listening in by persons in the other branches of government and persons in the private sector.

Mr. Chairman, that concludes my prepared statement and I would be pleased to answer any questions at this time.

Mr. ALBOSTA. Ms. Lawton, do you have anything that you would like to add to this?

Ms. LAWTON. If I could, Mr. Chairman.

STATEMENT OF MARY LAWTON, COUNSEL FOR INTELLIGENCE POLICY, DEPARTMENT OF JUSTICE

Ms. LAWTON. I am here not so much as a representative of the Department, but merely speaking for the intelligence community with which I conferred about this particular bill.

We have a number of concerns, and actually there is some desire to correct the record. I do have a short prepared statement, but I will summarize the main points.

Mr. ALBOSTA. Your full prepared statement will be entered into the record.

Ms. LAWTON. Thank you.

The Government Operations Committee report on H.R. 4620 found the recording of private conversations to be a violation of Federal employee ethics. However, the committee's own survey, as reflected in their report, contained several errors and we would like to point some of those out.

The appendix to the committee's report states that only 14 out of 71 Government agencies, or roughly 20 percent currently record and/or monitor Federal telephone communications.

In addition, none of the agencies listed permits the general recording of telephone conversations by its employees, as evidenced by the reasons recited in the report given by each of these agencies: four agencies monitor for investigative purposes; two for intelligence purposes; three for service monitoring and/or maintenance; one agency for terrorism purposes; one agency for communications security purposes; two for purposes of safety investigations; and, GSA conducts monitoring in order to investigate Federal protection.

All of these are specific, narrow, legitimate reasons for monitoring. And yet, in spite of reciting this in their report, the Govern-

ment operations report then suggests that GSA regulations are not working. We submit that they are.

The appendix to the report also suggests that the CIA, for example, is not in compliance with GSA regulations. Yet, the CIA advised the chairman of the full committee here that it is not subject to the regulations.

And if I might, for the correction of the record since this report does concern us, I'd like to submit a copy of that CIA letter to the committee for its records.

Mr. ALBOSTA. The letter will become part of the committee record without objection.

Ms. LAWTON. Thank you, Mr. Chairman.

This survey shows that telephone recording within the Federal Government is not of the magnitude one would suppose based upon one single, highly publicized example.

Keeping in mind this perspective on the problem, it's easy to see the deleterious effects that enacting H.R. 4620 would have on legitimate intelligence and related operations currently conducted by the Government.

As pointed out by the National Security Agency in a letter to Chairman Brooks of Government Operations, this bill, if enacted, would be the fourth statute to regulate electronic surveillance; an already exceedingly complex area of law.

Those statutes, I might add, were 7 to 8 years in the making.

First, activities that fall outside the scope of the Foreign Intelligence Surveillance Act of 1978, but which are nonetheless lawful, would be affected by this bill.

Contrary to the impression of FISA's provisions created by the Government Operations' report, FISA most commonly involves foreign intelligence electronic surveillance conducted pursuant to an order from the FISA court based upon an application certified by the Attorney General and not solely on the authority of the Attorney General.

FISA permits the surveillance, pursuant to a lawful order, of foreign powers or agents of foreign powers, which may include U.S. persons.

However, it does not apply to conversations or communications that take place completely outside the United States. Thus, agencies may conduct monitoring outside the United States without the necessity of obtaining a court warrant. H.R. 4620 may have a deleterious effect on these activities, as section (c)(4) of the bill only provides an overseas exemption for recording or listening in that is performed for counterterrorism purposes, not for foreign counterintelligence purposes.

Second, as we stated in the letter to Chairman Brooks, which Ms. Toensing referred to, H.R. 4620 expressly exempts one party consensual recording for counterintelligence purposes, but fails to mention positive intelligence.

It is not clear, therefore, whether the bill would authorize an exemption for positive foreign intelligence collection.

Finally, all intelligence agency interception of telecommunications is heavily regulated by regulations approved by the Attorney General. H.R. 4620 would add an additional layer of regulations to this preexisting structure, and in one instance requiring case-by-

case approval by the Attorney General of monitoring currently conducted under general guidelines that he has approved. One example would be the Defense Department's communications security monitoring.

Further, under the structure of this bill, the final authority on electronic interception would be the General Services Administration. And yet, GSA does not have the background or the expertise to deal in the sensitive areas of intelligence collection. That's one of the reasons the CIA is exempted from GSA regulations.

There are, in addition, a number of technical problems which are reflected in the letters from the Department and in the prepared statements and I won't go into those any further, Mr. Chairman.

But from an intelligence perspective, this bill creates serious and real problems for the entire intelligence community.

[The full prepared statement of Mary Lawton follows:]

STATEMENT OF MARY LAWTON, COUNSEL FOR INTERLIGENCE POLICY, OFFICE OF
INTELLIGENCE POLICY AND REVIEW

Mr. Chairman and members of the subcommittee, as Counsel for Intelligence Policy of the Department of Justice, I would like to thank you for inviting me to testify on behalf of the Intelligence Community regarding H.R. 4620.

Let me begin by saying that the testimony I am about to give has been discussed and coordinated with the intelligence agencies. For the reasons stated by Ms. Toensing, as well as reasons peculiar to intelligence agency operations, the Department of Justice opposes the enactment of H.R. 4620 as unnecessary and unreasonable. H.R. 4620 would impede legitimate, preexisting government programs that protect the security of highly sensitive and classified information and operations of government.

The Committee report on H.R. 4620 found the recording of private conversations to be a violation of federal employee ethics. However, the Committee's own survey of the Executive Branch, although containing several errors, nevertheless undermines its conclusions. The appendix to the Committee report states that only 14 out of 71 government agencies, or roughly 20%, currently record and/or monitor federal telephone communications. In addition, none of the agencies listed permit the general recording of telephone conversations by their employees, as evidenced by the reasons given by each of those agencies for recording and/or monitoring telephone calls; 4 agencies monitored conversations for investigation purposes, 2 agencies for intelligence purposes; 3 agencies for service monitoring and/or maintenance; one agency for terrorism purposes; one agency for communications security purposes; 2 agencies recorded for purposes of safety investigations; and the GSA conducts monitoring in order to "investigate federal protection."

This survey shows that telephone recording within the federal government, when examined closely, is not of the magnitude one would suppose based upon a single, highly publicized example. On the contrary, the few agencies that monitor telephone conversations do so for perfectly legitimate reasons. The most common reason for recording telephone conversations within the government, aside from intelligence or criminal investigative purposes, is to retain an accurate record of what has transpired during the conversation. This practice is common among journalists, as well as employees in private industry.

Keeping in mind this perspective on the problem, it is easy to see the deleterious effects that enacting H.R. 4620 would have on legitimate intelligence and related operations currently conducted by the government. As pointed out by the National Security Agency in a letter to the Honorable Jack Brooks concerning H.R. 4620, this bill, if enacted, would be the fourth statute to regulate electronic surveillance, an already exceedingly complex area of the law. Three statutes currently regulate electronic surveillance: the Wire Communications Act of 1934; the Omnibus Crime and Safe Streets Act of 1968; and the Foreign Intelligence Surveillance Act of 1978. The addition of a fourth statute in this complex area would unnecessarily complicate the administration of existing, lawful electronic surveillance programs operated by the intelligence agencies. The following examples demonstrate the effect of H.R. 4620 on intelligence activities.

First, activities that fall outside the scope of the Foreign Intelligence Surveillance Act of 1978 (FISA), but which are nonetheless lawful, would be affected. Contrary to

the impression of FISA's provisions created by the Committee report, FISA most commonly involves foreign intelligence electronic surveillance conducted pursuant to an order from the FISA court based upon an application certified by the Attorney General. Electronic surveillance without a FISA court order based solely upon the approval of the Attorney General is rare. FISA permits the surveillance, pursuant to a lawful order, of foreign powers or agents of foreign powers, which may include United States persons.

However, FISA does not apply to conversations or communications that take place completely outside the United States. Thus, agencies may conduct monitoring outside the United States without the necessity of obtaining a FISA "warrant." H.R. 4620 may have a deleterious effect on these activities, as section (c)(4) of the bill only provides an overseas exemption for recording or listening in that is performed for counterterrorism purposes.

Second, as the Justice Department stated in its May 29, 1984 letter to the Honorable Jack Brooks, H.R. 4620 expressly exempts one-party consensual recording for counterintelligence purposes, but fails to mention positive intelligence. It is not, therefore, clear whether the bill would authorize an exemption for positive foreign intelligence purposes as distinct from counterintelligence activities. The recording and overhearing by an intelligence agency official, acting within the scope of his employment, relating to either intelligence-gathering or counterintelligence activities is proper under present law and must continue. For these purposes the proposed exemption in section (c)(2) is simply inadequate.

Finally, all intelligence agency interception of telecommunications is heavily regulated by regulations approved by the Attorney General. H.R. 4620 would add an additional, unnecessary layer of regulation to this preexisting structure, in some instances requiring case-by-case approval by the Attorney General of monitoring currently conducted under guidelines already approved by the Attorney General. One example would be the Defense Department's communications security monitoring procedures.

Furthermore, the Justice Department believes that involving the General Services Administration in sensitive decisions commonly made concerning ongoing intelligence activities would be highly inappropriate in view of the fact that GSA has no expertise in intelligence matters.

Lastly, H.R. 4620 has several definitional problems that render it unworkable. For example, section (c)(3) permits the listening in or recording of conversations at "a military command center." It is not clear from this section whether the bill intended to cover command and intelligence center monitoring, as it is currently regulated by the Department of Defense. The term "command and intelligence centers" refers to a broad range of Defense Department activities that include the disposition of armed forces, the implementation of the Defense Department's foreign intelligence mission, emergency police and fire reporting, air traffic control, distress calls from ships and aircraft, and the coordination of actions resulting from bomb threats and hijacking incidents. Were H.R. 4620 to be interpreted to exclude any of these vital programs, it could seriously impair current Defense Department operations.

Thank you, Mr. Chairman and Members of the Subcommittee; that concludes my testimony. I would be happy to respond to any questions you may have.

Mr. ALBOSTA. Thank you both very much for your testimony.

Unlimited recording, according to the Government Operations Committee report, section 113(d) of the bill, as amended, makes it clear that any monitoring of telephone conversations that is now authorized by law, including proper Executive orders, would not be effected by this bill. And I am disappointed that your written testimony and your oral testimony this morning ignores that fact.

In addition, the Government Operations report states that this bill would not authorize any monitoring or taping that is not currently authorized by law.

To make this clearer, would it be advisable to amend this section to simply state that the bill outlaws all monitoring or recording that is not either consented to by all parties or authorized by law?

Ms. TOENSING. Is it authorized by law if I have a phone call from someone about to bribe me, and I start intercepting or recording

that? It is authorized under title III, and so that is the present state of the law. It is authorized.

Mr. ALBOSTA. It's authorized if you notify the other person that you are—

Ms. TOENSING. No. Title III allows it; this bill changes that.

Mr. ALBOSTA. Then automatically, the bill wouldn't allow for it. If it is now allowed in the law, then this does not affect that.

Ms. TOENSING. But the words on the face of the bill say otherwise.

Mr. ALBOSTA. Would you explain to me how you interpret that in terms of the language of the bill?

Ms. TOENSING. Section 113(a)(1): Except as provided in subsections (b), (c), and (d), no Federal official or employee shall cause or permit the recording of or listening in upon any conversation conducted on the Federal telecommunications system; and then the other one says you cannot do it on any telephone if it is Government business.

Mr. ALBOSTA. Would you read subsection (b), please?

Ms. TOENSING. Yes. Without the consent of any party to a conversation, the recording of, or listening in upon such conversation may be conducted notwithstanding subsection (a) if such recording or listening in is authorized under, and conducted in accordance with the requirements, of the Omnibus Crime Control and Safe Streets Act.

Mr. ALBOSTA. Would you continue?

Ms. TOENSING. With the consent of one party to a conversation, the recording of or listening in upon, such conversation may be conducted notwithstanding subsection (a), if the recording or listening in is performed in accordance with the following—

Mr. ALBOSTA. Is that the latest version of the law?

Ms. TOENSING. It's the May 31—

Mr. ALBOSTA. We will provide you with a copy of the latest.

Ms. TOENSING. I have the same bill. The problem is, Mr. Chairman, as I see it, you have said very specifically that no one can listen in on any conversation. Although you refer to other bills, there is some very specific language here.

Mr. ALBOSTA. Unless there is other applicable law. If there's other law that says you can, and under the question of national security and under the question of the armed services, under all kinds of laws that are now on the books that say you can, we say that we're not affecting that.

Ms. LAWTON. That is true, Mr. Chairman, as to totally unconsented electronic surveillance—that's what is being covered in (b), where neither party consents to—classic wiretapping—where neither party consents. As long as you're operating under applicable law, that's fine. But when you get down into the one-party consent, the sort of thing that Ms. Toensing mentioned, of the individual employee who records an attempted bribe, there's a different set of rules, those rules under (c), not the rules under (b), and then that employee is still in difficulty, or the Federal employee who is being sexually harassed, knows that that's a hard case to prove and, therefore, wants to prove that case by turning on the recorder and can't do it.

Mr. ALBOSTA. Well, would you recommend that we extend the law to cover all of those that are authorized now under the law?

Ms. LAWTON. Well, what is authorized now under the law is any recording with the consent of a party to the conversation. That's the current law, and that, presumably, is what this bill is designed to stop.

There is no statute needed for the one-party consent listening, if you want to continue to allow that. Title III allows it now—unless your purpose is criminal, title III allows it.

Mr. ALBOSTA. On remedies and penalties in regard to the criminal penalties; we, too, have noticed that this bill does not now contain a requirement that monitoring be willful or intentional. We had planned to correct that.

On the other hand, from statements made before the other body yesterday, and most of those submitted today, it seems that there is general agreement that there should be effective civil and administrative remedies for people who have been illegally taped.

I asked in my letter that you address the issue of civil and administrative penalties, but your written testimony did not. Am I correct in assuming that the administration does not oppose such remedies?

Ms. TOENSING. The administrative remedies are the GSA, and there are all sorts of personnel actions that people can take if someone is violating the GSA regulations, Mr. Chairman.

Mr. GILMAN. Would the gentleman yield?

Mr. ALBOSTA. Yes. I yield to the gentleman from New York.

Mr. GILMAN. Has there been any administrative action by GSA with regard to any prior violations under these rules?

Ms. TOENSING. If the person for GSA were here, he would at least tell you the following and perhaps he could shed more light than I am. When I had a conversation with him about how GSA proceeds on this, Mr. Gilman, he said that they look at it as a teaching process. These regulations were issued in 1981, and GSA worked with the various agencies to make sure that they understood these regulations. When they had problems they worked to educate the personnel. If someone violated them, GSA handled it as a personnel matter. So the person is given a reprimand or a firing, but within that spectrum. GSA does not look at it as a vindictive "let's get the person and lock them up" situation, but rather let's help our Federal employees understand what our rules are.

Mr. GILMAN. Then what you're saying is there really hasn't been any administrative action by GSA with regard to any violation except to be instructed.

Ms. TOENSING. Well, if you say "action," I say yes, GSA has done a lot to educate them. I think it is reassuring to know that the General Counsel of the USIA was very aware of these rules just 6 weeks after they were issued; that there are a lot of people that are aware of these rules.

If you will look at the report the Government Operations Committee put out, those who monitored were, for the most part, in compliance with the GSA regulations.

The report is misleading where it says only 14 agencies were in compliance. There were not that many agencies that actually monitored conversations.

Mr. GILMAN. Well, could we go to this proposed legislation. Do you see any possibility of working out some of the amendments that might be needed to exempt the intelligence agencies from any problem under this bill? That's essentially your major concern, I take it.

Ms. LAWTON. Well, that is the concern I am addressing today, yes, sir.

Mr. GILMAN. Isn't there some way of making certain of exempting the intelligence agencies from all of their concerns and still have some teeth with regard to the civil servants?

Ms. LAWTON. Well, I have a couple of answers to that.

Mr. ALBOSTA. Would the gentleman from New York let me add something to that.

What, if anything, was done with Charles Wick in his instance by the administration?

Mr. GILMAN. Mr. Chairman, I understand from the investigations and from what we found in our committee, the Ferris committee, and some of the other committees that they found there was no criminal violation, there had been some civil rules that had been violated. And again, as the Department of Justice representative has stated, there isn't any penalty with regard to what had occurred there.

Ms. TOENSING. I think for the most part that the many dedicated Federal employees are aware of this rule and, if not, can be educated to be aware of it without burdening them with the criminal sanctions that this bill intends to impose. It is discriminatory to submit only the Federal executive branch employees to this sanction. If indeed it is an evil, then all people should be subjected to it.

Ms. LAWTON. It should be pointed out, Mr. Gilman, that in this context, GSA, of course, has no authority to take direct disciplinary action over employees of any other agency or over Presidential appointees. But individual agencies—and we have not surveyed them all to see how they react on this, but I do know in the context of the Foreign Intelligence Surveillance Act and any deviation from the rules of that which require minimizing extraneous conversations, that there have been disciplinary actions taken by the agency itself against its own employee for violating the implementing regulations.

You have the general GSA regulations, and then implementing regulations in each agency, and I do know of instances of disciplinary actions for exceeding those regulations that have been taken in this context.

Mr. GILMAN. If the gentlewoman would further yield.

Ms. LAWTON, the question I asked is, Isn't there some way of revising this bill to protect the intelligence agencies in their information gathering and at the same time perfect a statute that would protect the right of privacy for individuals communicating with Government employees?

Ms. LAWTON. It is almost certainly possible to write out—just flatly say “no agency in the intelligence community is covered by this statute”; however, we have, as Ms. Toensing suggested, a more

fundamental problem with approaching this subject as a criminal law matter—every time we have worked on this bill, and I have been at it since February, or variations of it, something new turns up that we never thought of before and “Oh, my god, we didn’t take care of that problem.” I’m afraid that legislatively it is going to be very difficult to take care of the unforeseen in not just the intelligence area, but any area. There’s always some other perfectly legitimate listening in that isn’t covered. We were working on it concerned about law enforcement and intelligence and we realized the whole problem of the handicapped which had never been addressed in the early stages of this and now it has been.

Mr. GILMAN. That’s the purpose of the hearing.

This regulation at the present time is just a matter of instruction and nothing more than that, a slap on the wrist, so to speak. Is there a need for anything more than that?

Ms. LAWTON. Well, it is not just that. Of the agencies that do it—and there are very few agencies that do it at all, that allow monitoring, they all have internal regulations, and violations of agency regulations by agency’s employees are subject to disciplinary actions—not by GSA, but by the agency itself. The agencies that do it have regulations governing them, and they have the power to discipline now.

Mr. GILMAN. Well then, why shouldn’t there be a standard regulation to all agencies if they’re permitting some of the agencies to do that?

Ms. LAWTON. Because they all have different missions, different needs, different requirements.

Mr. GILMAN. And we couldn’t address that by a standard rule that covers all?

Ms. LAWTON. It would be very difficult, very difficult.

Mr. ALBOSTA. If the gentleman would yield.

Would you support establishing any mandatory administrative penalties for officials found in violation of the law?

Ms. TOENSING. Which law?

Mr. ALBOSTA. Well, this law would be one and the other laws or rules that apply that would become law?

Ms. TOENSING. We would support disciplinary action under a regulation because that provides the necessary procedural flexibility to deal with the employee depending on what the situation is.

Under this bill right now if you accidentally pick up the telephone and there are two people talking, you are in violation of the law. I do not think there should be a mandatory punishment for that person.

Mr. ALBOSTA. But under this law you would be exempt; if you picked up the telephone and accidentally overheard that particular call, you would be exempt.

Ms. TOENSING. There’s no intent requirement, but you said that you would fix that in the—

Mr. ALBOSTA. There would be no intent statement.

Ms. TOENSING. But it would seem that there are different situations where somebody who had inadvertently or technically violated something—

Mr. ALBOSTA. Well, what about the case of congressional telephone calls being monitored?

Ms. TOENSING. You mean taking notes?

Mr. ALBOSTA. Monitored and typed.

Ms. TOENSING. When I was in the Senate—

Mr. ALBOSTA. Isn't Communication Security Monitoring intercepting congressional telephone calls?

Ms. LAWTON. Not quite, Mr. Chairman, Communication Security Monitoring [Comsec] is not aimed at the content, it is aimed at electronic emissions in order to determine whether another foreign power is capable of picking up those emissions.

What we're trying to determine in Comsec monitoring is security of the transmission lines, not the content of the communication.

Mr. ALBOSTA. No records were ever kept of any of those calls?

Ms. LAWTON. Logs of where monitoring occurred and of the findings are kept until the report is issued by the agency, then the logs are destroyed.

Mr. ALBOSTA. Does that include congressional telephone monitoring?

Ms. LAWTON. If Congress requested Comsec monitoring it would. I don't know if the intelligence committees, for example, have ever requested it for the security of their telephones, normally it's the executive branch. We would not do a Comsec monitoring for the Congress unless it requested it. We have done other security procedures at congressional request, but this is primarily the executive branch because it may include contractors, I used the word "primarily."

Mr. ALBOSTA. Does the gentleman from New York have any further questions, or the gentleman from Illinois?

Mr. CRANE. Approximately how many States—does anybody know—have some kind of law in violation of taping a conversation?

Ms. TOENSING. It's my understanding that most of the States' laws are similar to title III, exempting the one-party consensual. There are a few States, about 13 or 14, somewhere in there, that limit even the one-party-consent situation. A good many States have electronic surveillance law like title III that exempt one-party consent but bar the unconsented, the true wiretapping.

Mr. CRANE. How many States are in that category, if you know?

Ms. TOENSING. I don't know.

Ms. LAWTON. I think there are only two to four that don't authorize it at all. I think most States have some authorized wiretapping for law enforcement.

Mr. GILMAN. For law enforcement, but how about the prohibition of unauthorized—

Ms. LAWTON. Most of them follow title III, which exempts one-party-consent situations.

Mr. GILMAN. When you say "most," roughly what are we talking about? Is that virtually every State?

Ms. LAWTON. We could find out. I'd hate to take a guess on something like that.

Mr. GILMAN. Could you present to our committee a breakdown on how other States have addressed this problem.

Mr. Chairman, I would like to ask that a response be made a part of our record at this point.

Mr. ALBOSTA. Without objection, we will make that a part of the record and we will enter it into the record as soon as we receive the response from the Justice Department.

Mr. ALBOSTA. There are, by our staff's calculations, 13 States that have rules similar to what this law would be.

Ms. TOENSING. Could I make a point along that line, Mr. Chairman, because I lived in Michigan before moving to Washington. In Michigan, law enforcement is not allowed to wire another party under case law in Michigan. So it made it very difficult for narcotic cases—we are talking about law enforcement, because one could not have an undercover officer wired to talk to a dope dealer. What would happen is that all those cases would be brought to Federal courts. So in those States there was not such an impact on law enforcement because they went to the U.S. attorney. I worked as an assistant U.S. attorney in Michigan, and we would take the cases not in accord with the State law.

Mr. ALBOSTA. I think in Michigan, though, you can get a court order for that wiretap if you have evidence that there is the sale and distribution of drugs.

Ms. TOENSING. Well, it takes probable cause and the foundation that you cannot get the information in any other way. That is very difficult. That's to limit the intercepting to a very, very few. So usually they came to Federal court, Mr. Chairman. Also, intelligence matters would not be affected by the individual States laws.

Mr. ALBOSTA. I believe there's no other questions by any of the other members. I don't have any further questions.

Does the gentleman from New York have any further questions?

Mr. GILMAN. I have no further questions.

Mr. ALBOSTA. Then we appreciate the witnesses being here this morning.

For the record, we will appreciate your providing the committee with the requests from the gentleman from New York. Thank you very much.

Ms. TOENSING. Thank you.

Ms. LAWTON. Thank you.

Mr. ALBOSTA. Our next witness will be the Honorable Phillip Coates, Associate Commissioner, Internal Revenue Service, Department of the Treasury.

Good morning, Mr. Coates. Thank you for coming before the committee today.

You can summarize, if you will, your testimony. Your written testimony will be put in the record in its entirety. You can read it if you so choose.

Mr. COATES. I'm going to read an abbreviated version of it, Mr. Chairman.

Mr. ALBOSTA. We would appreciate that.

[The response from the Justice Department follows:]



U.S. Department of Justice

Criminal Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

JUL 13 1984

Honorable Donald J. Albosta
Chairman, Subcommittee on Human Resources
Committee on The Post Office And Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

During my June 14, 1984 testimony on H.R. 4620 before your Subcommittee, Representatives Gilman and Crane raised questions concerning state laws regulating the interception of communications. They were particularly concerned about the number of states that have statutes prohibiting the recording of a conversation without the consent or knowledge of all parties to it, the principal activity which H.R. 4620 seeks to prohibit, if done by federal employees.

In researching this question, we have drawn to some extent on a January 15, 1981, publication of the Congressional Research Service of the Library of Congress entitled "Tapa and Buga: A Compilation of Federal and State Statutes Concerning the Interception of Wire and Oral Communications." This is the second time in the last decade that the CRS has prepared such a compilation. See also "Wiretapping and Electronic Surveillance: Federal and State Statutes," July 25, 1974. Of the fifty states, the CRS categorized 26 as "one party consensual" states and 9 as "all party consensual" states as of January 15, 1981.¹

¹ As I explained in my testimony, the terms "one party consensual" and "all party consensual" are derived from the present federal statute regulating the interception of communications, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et. seq.). Title III defines the term "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical or other device." The term thus includes the recording of a conversation by one of the parties to it as well as the "tapping" into a telephone conversation without the consent of either party to it. Because the Congress felt that the former type of conduct did

The 26 one party consensual states are: Alabama, Alaska, Arizona, Colorado, Connecticut, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Virginia, and Wisconsin.

The nine all party consensual states are California, Florida, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Pennsylvania, and Washington.

In the interests of providing a timely response to the Subcommittee, we have not ourselves researched the laws of the 35 above states to see if they have been changed in the past three years, and it is conceivable that a very few of them may have been revised. We have, however, examined the statutes of the fifteen other states that could not be neatly categorized by the CRS as one party consensual or all party consensual states.

Two of these states, Oklahoma, and Texas, have recently enacted new statutes which closely follow Title III and allow one party consensual interceptions. See §176.4 of chapter 13 of the Laws of Oklahoma (enacted in 1982) and §16.02 of Vernon's Penal Code of Texas (enacted in 1981). In addition, four states appear to have no laws prohibiting wiretapping or recording at all. They are Mississippi, Missouri, South Carolina, and Vermont. Two other states, Indiana and West Virginia, are for all intents and purposes in this same category since their statutes dealing with the overhearing of conversations are very narrowly drafted. Indiana Code §35-45-2-4 prohibits only an employee of a telephone or telegraph company from disclosing the contents of a message and does not prohibit the actual overhearing or recording. West Virginia Code §61-3-24(c) forbids a person, firm, or corporation from intercepting or monitoring a conversation between an employee or agent of the person, firm, or corporation and a customer without taking various steps to notify both the firm's employees and customers that monitoring is being conducted. The terms "intercept" and "monitor" are not defined and arguably may not include a recording. Even if they do, the statute is very limited. Thus, except in the very limited situations covered by the Indiana and West Virginia statutes, the recording of one's own conversation without the knowledge of the other party to it would not be illegal in these eight states, bringing the total of such states to at least 34.

not warrant criminal sanctions, Title III was specifically made inapplicable to interceptions (i.e. recordings) made with the consent of one party to the conversation, unless the interception was for a criminal, tortious, or otherwise injurious purpose.

On the other hand, while Delaware has a statute that closely approximates Title III in format, it is drafted in such a manner that interception of a conversation with the consent of only one party is allowed only if done under color of law. In other situations, Delaware is a two-party consensual state. See Delaware Code Title 11 §1336. Moreover, §45-8.213 of the Montana Code provides in essence that a person commits the offense of violation of privacy in communications if he records a conversation by means of a "hidden" electronic or mechanical device without the consent of all parties to the conversation. Presumably the term "hidden" is intended to mean that the presence of the device is not known to the party on the other end of the line.

In addition, §4931.28 of the Ohio Revised Code provides:

"No person shall willfully and maliciously cut, break, tap, or make connection with a telegraph or telephone wire or read or copy in an unauthorized manner, a telegraphic message or communication from or upon a telegraph or telephone line, wire, or cable, so cut or tapped, or make unauthorized use thereof, or willfully and maliciously prevent, obstruct, or delay the sending, conveyance, or delivery of an authorized telegraphic message or communication by or through a line, cable, or wire under the control of a telegraph or telephone company."

This statute would appear on its face to apply only to a classical wiretapping situation. However, the Supreme Court of Ohio has construed this provision in a case in which a police informant, in the presence of a police sergeant, recorded a telephone call to a former accomplice who made admissions about his part in a series of crimes. In ruling the recording admissible in evidence, the court "assume[d] ... that the actions of [the informant] and the sergeant fell afoul of these authorized under R.C. 4931.28," but refused to apply the exclusionary rule. See *State v. Geraldo*, 429 N.E. 2d 141, 147 (Sup. Ct. of Ohio, 1981). Thus, in at least 12 States, it is unlawful for a person to secretly record his own telephone conversations.

The remaining four states have statutory schemes somewhat similar to Ohio's but at least one, Tennessee's, has been ruled not to apply to one party consensual interceptions. Tennessee has two relevant statutes. §39-3-1324 of the Tennessee Code provides that it is a felony "to tap, cut, burn, break down, injure, or destroy, or otherwise to interrupt or interfere with the current, lines, cables, poles, towers, fixtures, or appliances utilized to furnish service to the general public by any telephone, or telegraph company, or electric light or power

company ... " §65-21-110 provides that it is "unlawful for any person to damage or obstruct any telegraph or telephone poles, wires, fixtures, or other apparatus or appliances, or to impede or impair the service of any telegraph or telephone line; or to connect by wire, or other means, with any such line so as to hear ... messages going over said lines or lines without first procuring the consent of the owner or owners of said line ..." The Tennessee Court of Criminal Appeals has examined these provisions and held that "[t]aken together, these statutes authorize, by implication, the recording of a telephone conversation where one party to the conversation consents to the recording." Stroup v. State, 522 S.W. 2d 418, 420 (1977).

The reasoning of the Tennessee court would appear to apply also to the statutes in two of the remaining three states which are clearly aimed at wiretapping and ignore the question of a one party consensual recording. §37-12-122 of the Wyoming Code provides in part that "[whoever] shall willfully and maliciously, cut, break, tap, or make any connection with, or read, or copy by use of telegraph or telephone instruments, or otherwise, in any unauthorized manner, any message ... from any telegraph or telephone line, wire, or cable, so unlawfully cut or tapped ... shall be deemed guilty of a felony ..." §14-155 of the North Carolina Code makes it "unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company ... except such connection as may be authorized by the person or corporation operating such wire or apparatus." However, it is an open question as to whether courts in these states would follow the Stroup decision in Tennessee or the Geraldo case from Ohio.

Finally, §73-1810 of the Arkansas code provides: "If any person without authority intercept (sic) a dispatch or message transmitted by telegraph or telephone, or wilfully destroys or injures any telegraph or telephone, pole, wire, cable or fixture, he is guilty of a misdemeanor." It is likely that this statute, first enacted in 1885, applies only to wiretapping and not to one party consensual recording, but we are unaware of any Arkansas case construing it. Hence, it is possible that a court would ascribe the same meaning to the term "intercept" as was provided by the Congress in enacting Title III and rule that this statute applied to one party consensual recordings.

In sum, it appears that one party consensual recording of telephone conversations is allowed in 35 states and prohibited in 12. In the remaining three, the question appears to be in doubt. The fact that nearly three quarters of the states do not criminalize this conduct should underscore the unfairness of making it a crime for federal employees to do so, while ignoring the same activity by everyone else.

I would also like to elaborate on another problem with H.R. 4620 which we discussed to some extent at the hearing. As I mentioned, equipping an informant with a recording or transmitting device for the purpose of providing a verbal record of a criminal transaction is a common police tactic. For example, the police frequently "wire" an informant or undercover officer before sending him to buy narcotics. The recording of the money and drugs changing hands provides powerful evidence and frequently prevents defendants from fabricating an entrapment defense. Another common tactic is to request a criminal who has been arrested and who has expressed a desire to cooperate with the authorities to make a recorded telephone call to an accomplice. If the accomplice admits his part in the crime, a recording of the conversation is strong evidence of his guilt. The present federal law (Title III) allows the above types of interceptions and does not require a warrant before making them.

The enactment of H.R. 4620 would make this procedure much more difficult for the Drug Enforcement Administration, the FBI and all other federal law enforcement agencies. The bill (in proposed subsection 113(2)(b)) only exempts recordings and listenings-in made under Title III and other applicable federal law if the interception is made without the consent of any party to the conversation. Interceptions made with the consent of one of the parties, like those described above, would be governed by proposed subsection 113(c)(1) which provides that the general prohibition against recording or listening in does not apply when these activities are performed for law enforcement purposes "in accordance with procedures established by the agency head, as required by the Attorney General's guidelines for the administration of the Omnibus Crime Control and Safe Streets Act of 1968, and in accordance with procedures established by the Attorney General." As we discussed in our letter on H.R. 4620, no such Attorney General Guidelines exist. More important, a system which requires the many federal agencies to establish their own guidelines could be so cumbersome and unwieldy that law enforcement agencies would be reluctant to use the technique of making one party consensual recordings. For example, some states allow one party consensual interceptions for law enforcement purposes but only if a warrant is obtained.² It has been our experience in states with stringent warrant requirements or other complicated reporting provisions for one party consensuals that state law enforcement efforts are so hampered that their officers present their cases, in which there is concurrent federal-state jurisdiction, to federal prosecutors for prosecution in federal court. We can envision a similar unnecessary impairment of federal law enforcement if H.R. 4620 were enacted.

I hope that the above information is of assistance to the Subcommittee.

Sincerely,

Victoria Toensing
 Victoria Toensing
 Deputy Assistant Attorney General
 Criminal Division

² For a compilation of state statutes, see Fishman, Wiretapping and Eavesdropping, 1978, §8, and the December, 1983 Cumulative Supplement thereto.

**STATEMENT OF PHILLIP COATES, ASSOCIATE COMMISSIONER,
INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY**

Mr. COATES. I do have with me this morning, Mr. Chairman, Mr. John Rankin, who is our Deputy Assistant Commissioner for Criminal Investigation; Mr. William Wauben, Deputy Assistant Commissioner for Collection; Mr. Walter Alt, our Director of Taxpayer Service Division, all of whom have an interest in the bill and will be here to answer any questions that you may have.

We are here to talk about H.R. 4620. You have already heard from the Justice Department, Mr. Chairman. And to the extent that IRS operations are like those of the law-enforcement agencies, our comments will substantially follow those already provided.

I will, however, mention some law-enforcement-related issues that may arise under the bill. In addition, the Service also has civil-enforcement responsibilities. My testimony will also cover the effect that H.R. 4620 has on the Internal Revenue Service's civil enforcement of the tax laws.

On June 1, the Treasury Department provided comments on H.R. 4620 to Chairman Ford. Those comments will be submitted with my written statement.

The Internal Revenue Service is a Federal agency, Mr. Chairman, charged with the administration of tax laws. Tax administration in the United States is primarily based on a voluntary self-assessment system of collection.

In our efforts to administer a very complex system, we perform both the functions of an educator and tax collector.

In the role of educator, we employ a wide range of programs to alert taxpayers to their obligations under the internal revenue law. And, of course, you are familiar with the tax package that comes out each January and the variety of publications available from the Service.

In addition, our taxpayer-service function responds to both oral and written inquiries about tax questions. Each year our contacts total more than 50 million.

In the area of tax collector, we use a wide variety of collection techniques, many of which are dependent upon telecommunications network. In the administration of tax laws, the Service listens in to and records a limited number of communications for a number of different reasons.

It is our view that H.R. 4620 would negatively affect our ability to efficiently perform our educational and collection responsibilities.

The Service's taxpayer-service function does record certain telephone conversations. Taxpayers may request Federal tax forms by leaving a message with what is essentially a telephone-answering machine.

Presumably this type of recording would be permissible under the consent of all-parties exemption to the general rule of H.R. 4620; however, it is not clear from the legislation how that consent is to be obtained. The question of consent to monitoring a relatively simple question under these facts may present more difficult issues in other contexts.

If a person continues a telephone conversation after being informed of the possibility of monitoring, then consent must be implied.

The taxpayer-service program also provides answers over the telephone to taxpayers' questions. On a limited basis, answers given to taxpayers are monitored to determine the accuracy of the information given and the need for additional or modified training programs.

In many areas, the tax law is extremely complex, and this monitoring system is necessary to assure the taxpayers are given accurate information.

Congress and the GAO in the past have been critical of our taxpayer-service-accuracy rates, and in the past have specifically encouraged an increased use of monitoring in the taxpayer-service area.

It should be noted that the identity of the caller is usually unknown to the assistant, unless the taxpayer's account must be researched or the call requires a call back.

A relatively small, but statistically valid sample of answers given to taxpayers are monitored to determine the accuracy of the information given and the need for additional or modified training.

Unfortunately, it is not clear that the exception to service monitoring found in subsection (c)(7) extends to this type of monitoring.

In the House report to H.R. 4620, the Service monitoring exception is limited to situations involving the accuracy of information or the manner in which the information is given. Although closely related to the accuracy aspect, we think it would be appropriate to include general-management purposes in the exception; and, in addition to pure-accuracy concerns, monitoring may be used to determine if a particular method of providing information is working well if such monitoring may identify training needs or provide an overall evaluation of the project.

The Service also provides information to taxpayers through a teletax system. Under this system, a taxpayer calls a general number and then requests—either by voice or push-button telephone—a recorded message dealing with his or her particular problem.

After the message, we ask the taxpayers to evaluate the response. Most frequently, we ask the taxpayer to push a button on the phone that corresponds to how he evaluates the response to the question that he has posed. Our recording of these impulses would appear to be a violation of the recording provision of the bill.

In the collection area, Mr. Chairman, the vast majority of the taxpayers pay their taxes due in a timely manner. We must make every reasonable effort to perform this collection function, the actual tax collection function in the most efficient manner possible.

Consistent with our responsibility as a public agency, the Service employs the most up to date and sophisticated techniques to collect outstanding balances of taxes due.

An example of this technique is an automated collection system; a relatively new system. Under this system, a computer stores the relevant information about a balance due from a taxpayer, and automatically telephones taxpayers.

When the taxpayer answers, a Service employee will discuss the account while the computer displays the relevant account data to our employee.

During the telephone conversation, the Service employee will enter or record data provided by the taxpayer.

We are concerned that this recordation of data on a telecommunication system may violate the rules of H.R. 4620.

Under the automated collection system, a significant amount of supervisory monitoring takes place. Again, the House report on H.R. 4620 seems to limit the service monitoring exception in subsection (c)(7) to activities designed to determine whether the information provided to the public by employees is accurate and given in a polite and cordial manner.

In the instance of automated collection system's monitoring and other similar situations, the monitoring is also performed for other purposes; to determine whether our employee is using the system properly and employing appropriate collection techniques when dealing with taxpayers.

It is not clear whether the service monitoring exception would cover these activities.

The service monitoring exception requires that the monitoring party may not record data identifying the caller. In the Automated Collection System instance, data identifying the caller is an integral part of the conversation. This is not a situation where we are providing advice to the general public. Rather, we are collecting a tax due from a particular taxpayer.

In fact, the major function of the Automated Collection Tax System is to initiate calls to taxpayers.

As I have mentioned at the outset of my statement, the service does have law enforcement responsibilities similar to those of other Federal law enforcement agencies.

We are extremely concerned about 4620's law enforcement exceptions in section 113(c)(1) may fail to provide an adequate exception.

The bill's exception for law enforcement purposes read as follows:

The recording or listening in is performed for law enforcement purposes in accordance procedures established by the agency head, as required by the Attorney General's for the administration of Chapter 119 of Title 18, United States Code, and in accordance with procedures established by the Attorney General.

Despite the statute's reference to title 18, the Justice Department has noted that nothing in that chapter specifically requires or authorizes the Attorney General to establish guidelines or procedures for one-party consensual monitoring. Currently, there are no such procedures and, as a result, the bill may not provide a currently operative law enforcement exception.

Furthermore, the specific enumeration of crimes in chapter 119 raise the question of whether proceedings relating to crimes can qualify under the law enforcement exception.

Under the bill's existing language, some very basic and necessary procedures are potentially jeopardized. The following are a few examples:

EMPLOYEE SAFETY

An employee is assigned an investigation audit involving a known tax protestor. There is reason to believe that the employee's safety will be jeopardized. To protect the employee, monitored telephone calls will be made to the taxpayer.

TITLE 26, SECTION 7214 (A) (2) CRIMES

This section of the IRC enumerates crimes by IRS employees such as extortion, conspiracy, fraud, false statements, failure to report, and acceptance of gratuities. Since title 26 crimes are not mentioned in title 18, chapter 119—section 2510, et cetera—the use of monitored telephone calls as an investigative technique may not be allowable. For example, a taxpayer alleges that an IRS employee has made a false statement in a report. A monitored telephone call between the taxpayer and the IRS employee will be made to substantiate the taxpayer's allegations.

IMPERSONATION OF AN IRS EMPLOYEE

Unscrupulous individuals and confidence men will impersonate IRS employees for fraudulent purposes. Monitored telephone calls will be used to gather evidence. Since title 18, section 972—impersonation—is not mentioned in chapter 119 of title 18, it is questionable whether this investigative technique would be allowable.

The service has a series of problems with the proposed limitations on the recording and listening-in or telephone conversations.

We believe that the limited use of recording and listening adds significantly to the efficiency with which the service can perform its goals.

The example I have provided may be only the tip of the iceberg of those monitoring programs that may be prohibited under 4620.

Before any restrictive legislation is enacted, further study of the extent of the problem and the scope of any solution should be undertaken.

In particular, it would be worthwhile to attempt to determine whether existing agency safeguards are adequate to address the problem.

We will submit for the record a series of policy statements adopted by the Service regarding our monitoring procedures. A number of these adopt the safeguards of H.R. 4620.

We believe that mechanisms such as these effectively protect the individual's right to freedom from government intrusion into private communications. My associates and I would be happy to answer any questions you may have.

[The materials identified in the following list were retained in the subcommittee files. The views of the Department of the Treasury, letter dated June 1, 1984, follow:]

POLICY STATEMENT AND INTERNAL REVENUE MANUAL MATERIALS
GOVERNING QUALITY REVIEW TELEPHONE MONITORING

- (1) Policy Statement P-1-44 -- Monitoring of Taxpayer Service, Collection Office Function, and Service Center Collection Function Telephone Conversations.
- (2) Internal Revenue Manual Handbook 6541, Chapter 410 -- Monitoring
- (3) Internal Revenue Manual Handbook 6542, Chapter 120 -- Ban on Recording Taxpayer Identification During Phone Monitoring
- (4) Internal Revenue Manual Handbook 6560, Chapter 250 -- Telephone Service Quality Review
- (5) Internal Revenue Manual 5187 and Exhibit 5100-27 -- Monitoring Telephone Calls
- (6) Internal Revenue Manual 5(19)12, Chapter 500 -- Telephone Monitoring in ACS (Automated Collection System)



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

JUN - 1 1984

Dear Mr. Chairman:

The Department of Treasury wishes to submit its views on H.R. 4620, the "Federal Telecommunications Privacy Act of 1984". In general the bill prohibits Federal officers and employees from causing or permitting the recording of or listening in on conversations conducted on the Federal or other telecommunications systems, with some exceptions. The Department strongly opposes H.R. 4620 because we do not think that legislation is needed in this area and, even if a need did exist, we doubt that this bill can be amended to remedy our significant reservations.

Our initial concerns relate to the scope of the restrictions, which do not differentiate between recording and listening in where effected through a mechanical or electronic instrumentality, on the one hand, and through stenographic recording or listening in where a speaker phone is used, on the other. The bill makes the latter type of recording or eavesdropping criminally punishable. We believe this is harsh and beyond the scope of activity which legislation should limit. In addition, H.R. 4620 gives the GSA new authority over matters peculiar to each agency's mission and expertise which would be better left to the agency.

Section 113(g) provides fine and imprisonment sanctions for violations of the bill. There are no corresponding provisions for civil penalties even though the preceding subsections require GSA to take steps to obtain agency compliance. Thus, while there appear to be administrative duties required, there are no procedures for ensuring administrative compliance with those duties, and the criminal penalties theoretically encompass any failure of compliance under the bill.

Further, there is no requirement that a person have knowingly violated the bill's provisions for the criminal penalties to be imposed. For example, if an agency employee failed to document or improperly documented a telecommunications device which permitted another agency employee to monitor a conversation, both employees could be charged with

violations. However, the official who failed to document the device might be administratively sanctioned, and the employee who actually monitored could be subject to criminal penalties, even if he were unaware of the first employee's administrative failure and believed his conversation to be legal.

Similarly, a secretary who walked into an office where a speaker phone conversation was underway, and inadvertently overheard a conversation, might be subject to criminal prosecution. While an extreme example, this highlights our problems with the bill's poorly drafted criminal sanctions which have no requirement that action have been taken knowingly, nor that the illegal listening in have damaged the government or any individual.

Section 113(c)(1) (relating to monitoring with the consent of one party) establishes conditions on law enforcement monitoring which rely on "Attorney General guidelines for the administration of the Omnibus Control and Safe Streets Act of 1968". First, there are no Attorney General guidelines for the administration of that Act, raising the question of whether the law enforcement exception is operative at all. Second, the Attorney General's procedures for telephone monitoring require agency heads to adopt rules for their agencies, but do not promulgate government-wide rules. In addition, as presently worded, the law enforcement exemption contained in this section may be read so as to preclude adequate coverage of all necessary law enforcement activities, some of which are not directed towards criminal activity.

Section 113(c)(5) of the bill excepts from the general prohibition, monitoring with the consent of one party for public safety needs. The section would, however, require such monitoring to be documented by written determination of the agency head or his designee citing the particular need and identifying the segment of the public needing protection and citing examples of the danger. These requirements may actually delay or hinder public safety measures already in place under strict safeguards in this agency.

The exemption in Section 113(c)(7) of the bill for service monitoring would also cause problems. The bill does not make clear whether this exemption includes monitoring for purposes other than ensuring the proper functioning of telephone equipment. The Treasury would prefer a specific exemption for monitoring to evaluate employee telephone performance and to identify other personnel-related problems. Such monitoring should also be controlled by the

Treasury, which is familiar with its particular agency needs and procedures.

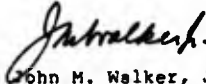
Under 113(d), monitoring and listening in would be permitted with the consent of all parties. However, this monitoring would be controlled by GSA, removing agency discretion even in the most routine administrative situations, such as speaker phones, telephone conference calls and the like.

Finally, because the Internal Revenue Service has its own serious concerns with the bill, I am enclosing their separate comments, which have been endorsed by the Commissioner of Internal Revenue, Roscoe Egger.

In sum, while the Treasury recognizes Congress' concerns with potential abuse of telecommunication systems, we believe these concerns are not properly addressed by this legislation. We believe that potential abuses can be more effectively addressed administratively by individual agencies, rather than by government-wide legislation.

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

Sincerely,



John M. Walker, Jr.
Assistant Secretary
(Enforcement and Operations)

The Honorable
William Ford, Chairman
Committee of Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Enclosure

Internal Revenue Service CommentsFederal Telecommunication Privacy Act of 1984

Enactment of H.R. 4620, Federal Telecommunications Privacy Act of 1984, would endanger valuable practices and procedures that have already been designed to protect taxpayers. In particular, the bill raises the following specific problems:

Law Enforcement Purposes Exception

New proposed section 113(c)(1) fails to provide an adequate law enforcement exception. The bill's exception for law enforcement purposes reads as follows:

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

Despite the statute's reference to the requirements of the 1968 Act, the Justice Department contends that nothing in the Act specifically requires or authorizes the Attorney General to establish guidelines or procedures for one-party consensual monitoring. Currently, there are no such procedures and as a result the bill may not provide a currently operative law enforcement exception.

In addition, there is the definitional question of what is a "law enforcement purpose". Law enforcement purposes may not include civil enforcement proceedings. Consequently, the sophisticated collection programs which involve recording taxpayer commitments would be prohibited.

This problem is not limited to the Service. Due to the experience that the IRS has in being a creditor, a large number of Federal agencies look to us for expertise in

collection matters. The Service is constantly upgrading practices to provide efficient collection of delinquent accounts. As we move toward the most sophisticated collection techniques in the coming "paperless age", we have found that recording taxpayer commitments to pay delinquent accounts has been an effective tool. Other agencies have expressed interest in our collection programs.

Also, we believe that there is a definitional problem with the word "recording". The legislation might prohibit stenographic recording or even note taking -- such a construction would lead to absurd results. For example, we could take a telephone complaint from a taxpayer but could not write down his name.

Service Monitoring Exception

In proposed Section 113(c)(7) the bill would provide an exception if:

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

Even if this exception permitted monitoring similar to that now done in Taxpayer Service and Collection, which is not at all clear, the bill provides a set of controls and hurdles in Section 113(e) that significantly complicate administration of the program. An inadvertent failure could jeopardize the whole program.

Disclosure Problems

In new Section 113(f), the proposed legislation would provide GSA with access to monitored information. Since this information may be "return information" under Section 6103 of the Internal Revenue Code, such access should not be permitted.

Conclusion

The enactment of H.R. 4620 would prohibit the use of monitoring for civil enforcement proceedings. The bill's exception for law enforcement proceedings is insufficiently defined. While there is an exception for taxpayer service-type monitoring, that exception is complex and unwieldy. The statute also poses problems with section 6103 of the Internal Revenue Code concerning disclosure of returns and return information. In sum, the statute would endanger valuable practices and procedures that have already been designed to protect taxpayers.

Mr. ALBOSTA. Thank you very much for your testimony, Mr. Coates.

I know that the monitoring by IRS is not intended to catch tax evaders, but I would like to know if the IRS warns every person who calls for taxpayer advice that what they say is being monitored and it may also be used against them even if not monitored by a third party?

Mr. COATES. Mr. Chairman, when we receive calls from taxpayers, we don't inquire as to their name or their identity, and we receive thousands and millions of calls in the course of a year. They are not informed that the call may be monitored. I will check with Mr. Alt to confirm this, but we do not identify the taxpayer. We do not have any need to know who the taxpayer is that's calling, because they're simply calling for information.

Our employees on the receiving end are well aware that the conversation may be monitored, and our phones are appropriately labeled that are used for telephone taxpayer assistance.

Mr. Alt may have some further comment.

Mr. ALT. We also mention in the tax package that the calls may be monitored, and in any publicity that we give out. It's a known fact that we do monitor a certain number of calls.

Mr. GILMAN. Would the gentleman yield. In addition to that, when a caller calls in, do you also remind him of that?

Mr. ALT. No, we don't.

Mr. COATES. They're reminded in the tax package and are aware of it; but the fact that they do not have to identify themselves, there is no specific—

Mr. CRANE. Would the gentleman yield for one moment on that, please.

You mentioned that you monitor for the determination of accuracy of information. Is that strictly the accuracy of information from your end, or are you determining the accuracy of information of the individual calling?

Mr. COATES. No, Mr. Crane. The accuracy of the information that we are providing the taxpayer who is calling for information with a specific problem, whether or not our assistants are providing accurate—

Mr. CRANE. So in no way are you checking to find out if the caller has conformed with—

Mr. COATES. No. We don't even know who the caller is when they call for information. They may pose the usual question of as simple as "where do I file my return, what are the due dates," or may be talking about capital gain, a multitude of questions, and our assistants are there to provide those types of answers.

Mr. ALBOSTA. Would it be difficult for you to include in your recording "your statement will be recorded"? It would take that long, 1 second, 2 seconds.

Mr. COATES. The point is, Mr. Chairman, that the call is not recorded and very few—a small, small percentage—are monitored.

Walter, do you want to go ahead?

Mr. ALBOSTA. Well, we could change the word to "monitored". Would that be difficult?

Mr. ALT. Well, the only thing, we answer approximately 40 million calls every year. By making a statement of that nature at the

outset may raise additional questions which would have to be addressed and just lengthen the call. It is not in our view cost effective.

We feel that the methods that we use are known. We have been doing it for a number of years, it's a well-known aspect of the service that we provide, and we limit it to a very small number. It's a valid sampling on a nationwide basis. It's less than one-half of 1 percent of the total number of calls that we get. It's well known. It's in the tax package, it's in our publicity, it's in any brochures that we have. We're not hiding the fact.

Mr. COATES. And, Mr. Chairman, the employee is aware of the monitoring.

Mr. ALT. Yes. The phones are labeled and the employees are aware.

Mr. ALBOSTA. I'm troubled by the letter from the Department that you monitor calls in order to see if there are personal problems. Your letter said that. This is a very dangerous practice. Why, if it doesn't mean anything, do you say in your letter that you monitor these calls to see if there's personal problems?

Mr. COATES. That's personnel.

Mr. ALBOSTA. Personnel problems. OK.

Mr. COATES. Well, in monitoring the call to see if there are personnel problems, that would be a very remote situation. In fact, I can't come up with a specific example that we would monitor for that.

Mr. ALT. We monitor to validate the accuracy of the answers.

Mr. ALBOSTA. You mean the personnel that's answering the telephone?

Mr. ALT. The accuracy of answering the question.

Mr. ALBOSTA. Of the taxpayer?

Mr. ALT. Right. Is it an accurate answer or a correct answer. Then if we get a trend, we can highlight the error in training or what have you.

Mr. COATES. We just want to be absolutely sure.

Mr. ALBOSTA. How many millions of these calls did you say you receive?

Mr. ALT. We receive approximately 40 million. In 1983, we answered approximately 39.8 million calls.

Mr. ALBOSTA. How many of those do you check for personnel problems?

Mr. ALT. Not personnel problems. Again, Mr. Chairman, on a nationwide basis in 1983, we monitored approximately 73,000 calls. It's a statistically valid sample on a nationwide basis.

Mr. COATES. We would, Mr. Chairman, be interested in if an employee is consistently giving improper information, consistently not providing correct information in dealing with the taxpayer. It would be a personnel problem and, obviously, we would want to know.

Mr. ALBOSTA. Does your employee know that you are doing this?

Mr. COATES. Absolutely. And the phones that they are using are clearly labeled, indicating that this phone may be monitored.

Mr. CRANE. You mentioned your 40 million, and then you get down to 73,000. I think, as the chairman mentioned earlier, what would be the problem with just making a brief statement that

we're recording 73,000 and just initially get it over with, because I feel that those that you're monitoring, it would be worthwhile to notify the individual at the other end because—and I want to ask you this specific question: What if the individual at the other end gives their name, address, or whatever, and you haven't even notified them that they're being monitored, or you do know the identity of that taxpayer that you're taping or monitoring or whatever you want to call it?

Mr. ALT. No; because the calls are selected on a random basis. The individual at that particular time is unaware that they're being monitored. The monitoring is done on a random sampling basis.

If the monitor does record any identifying information which may come about if it's a tax account question, we have the rules in the manual that after they validate the response—which may have to be looked up on the computer or what have you, that the identifying information is destroyed within 24 hours.

Mr. CRANE. Have you ever monitored any telephone call for any other reason other than a random basis?

Mr. ALT. Not to my knowledge.

Mr. COATES. That would violate our own internal rules and regulations, Mr. Crane, and would not be done.

Mr. CRANE. So what you're saying is you have never done that.

Mr. COATES. In that we're speaking now in the context of the taxpayer service programs of calls being received from taxpayers, the monitoring is simply to determine the quality and accuracy and the tone and cordiality, the whole management that we would be interested in in a program of that kind.

Mr. CRANE. What if you got information on one of your personnel that you thought was more likely than another to be making mistakes, do you go monitor that individual?

You're mentioning randomly selecting anybody, but if somebody came in and say "hey, I think Joe Smith here is making a heck of a lot of mistakes, not giving proper information," do you monitor that individual?

Mr. ALT. The manager of that individual may monitor that individual to try to help that individual, to more or less give that individual specific training in the areas where they may be the weakest.

Mr. CRANE. So what you're saying is that that individual is not randomly selected.

Mr. ALT. That may not be in the case of a manager monitoring.

Mr. ALBOSTA. I'd like to read from page 2 of your written statement—the letter of June 1. It's page 2, last paragraph, the sentence that starts with "The Treasury would prefer specific exemption for monitoring to evaluate employee telephone performance and to identify other personnel-related problems".

Would you think that in our legislation that we would be able to find some way of being able to permit or allow you to do that under the legislation?

Mr. COATES. It's possible, Mr. Chairman, that you could draft legislation that could cover that point.

Mr. ALBOSTA. Would you, for the purpose of the record, for the committee's help, provide us with what you think would be proper

language to be able to relate to the personnel problems but not to the taxpayer, if there's a way that you could do that?

Mr. COATES. We would be happy to. We will try, yes, sir. That would come, I think, primarily, Mr. Chairman, in our automated collection area and taxpayer service.

Bill, do you have some thoughts on that?

Mr. WAUBEN. I think it would be very easy to do. We're primarily interested in the automated collection system to ascertain how our employees are effectively dealing with that taxpayer. The taxpayer problems are, of course, pulled into that, but we're not primarily interested in the taxpayer's problems, per se, during that type of monitoring.

Mr. ALBOSTA. Well, if you would be able to give us that so that we would still be able to protect the employees' rights with this. We do not want language that would violate the civil service employees' rights. Obviously, that would be your intent also.

Does the gentleman from New York have questions?

Mr. GILMAN. Thank you, Mr. Chairman.

Apparently your major concerns is monitoring of the quality of the work that you perform in your own office. It would seem to me we ought to be able to provide some language in this kind of a bill to protect that situation that as long as it is not for a use in any investigatory manner. Then with regard to any of the criminal aspects, I think the general provisions certainly can be provided to take care of any criminal investigation.

Aside from monitoring in your criminal responsibilities, are there any other concerns either of you would have about a measure of this nature if we were able to evolve language to protect your quality observations of the workplace and included an exemption for any of your criminal investigation violation of the law? Would you have any other concern about this legislation?

Mr. COATES. I guess, Mr. Gilman, my answer would be like this: We would be very concerned in law enforcement areas. We spelled that out, as well as did the Department of Justice. In the other area, we just don't know how many specific situations might be identified that would be involved.

As I pointed out, maybe the three, four, or five examples we mentioned might be the tip of the iceberg. We just haven't had time to sit down and study completely what all would be involved.

Mr. GILMAN. Well, we're certainly not marking up the measure today, and that is the purpose of these hearings, to give you an opportunity to take a look at it, and we hope you would take a look at it, and if you have some constructive suggestions, we would welcome it as we consider the legislation. Or if there is something that is very serious about the impact of a measure of this nature, then let us know. Now is your time to be heard. We're not saying to do it today, you certainly have some time to look this over.

Mr. COATES. All right, sir.

Mr. ALBOSTA. I think the gentleman's suggestion is very well taken by this chairman. We would hope you would look over all the present laws and see if you don't have the leeway to do your criminal investigative work, or whatever other activities now are permitted under the law to make sure that your agency operates and functions properly. So if you could, check out all those areas

and come back to the committee with a statement as soon as is possible.

As the gentleman from New York says, we're not marking up this bill today or tomorrow or next week. We hope to be able to continue hearings on this bill. It's something that's been around, and we share this responsibility with several other committees and we would hope that, because there is an apparent need at least for some type of legislation, that we could get the legislation into its proper form so it would not damage any agency's operation and still would give us the kind of protection for the taxpayers in your case and other people that might use telecommunications or any of our communicating systems to know that if we are going to monitor them that we're not going to be a Nation that operates somewhat like the Soviet Union where no one knows what's going on except the Government itself. We're trying to perfect those rights, yet we do not want to interfere in any way with security interests, defense interests, or criminal types of investigations.

Mr. COATES. I would hasten to point out, Mr. Chairman, that all of our rules, regulations, policy statements, and guidelines are published in our manuals, in our directive, and are all public information. So anything that we are doing is well known, not only to our employees, but to the public in general. If they want to take the time, and have the interest to look, there is nothing that isn't published and that isn't available for anybody that wants to see it.

And we feel that our regulations, rules, guidelines, and policy statements are completely accurate in dealing with the situation in protecting the taxpayers' privacy and our employees.

Mr. ALBOSTA. I would probably venture to say and not be too inaccurate that most taxpayers do not read all the rules that pertain to the Internal Revenue Service.

We don't want conversations of unsuspecting taxpayers being monitored, if you will, without their knowledge. And most of them are well-intentioned, are not trying to beat the Government out of their taxes. The information that they would want in most cases would be information that would help them. And I think that service is a valuable service to the taxpayers, by the way. And I, as a Member of Congress, have supported the idea that we continue to have these people available in the IRS for information to the individual taxpayer, but, at the same time, I'm troubled by the fact that it's possible for their conversations to be monitored without their knowledge.

I appreciate your being here this morning.

Mr. CRANE. If the gentleman would yield.

Mr. ALBOSTA. The gentleman from Illinois.

Mr. CRANE. I have just one or two more questions, Mr. Chairman. You mentioned in your statement on page 2 that the Internal Revenue Service listens in to and records a limited number of communications for a number of different reasons.

Can you give me some more of your reasons why you monitor your own personnel?

Mr. COATES. Primarily I can cite, Mr. Crane, some specific examples. Again, the telephone answering device that we use for forms. A taxpayer calls in and asks for forms. That isn't actual monitor-

ing, but we do record the information and the taxpayer's name and address.

In the taxpayer service area, we monitor telephone calls coming in requesting taxpayer service. Another very important one is the Automated Collection System in which our data on delinquent accounts is stored in the computer, and the computer actually makes the phone call. We are, in that instance, initiating the phone call, and it's very important in one like that, that the taxpayer—well, an integral part of the system is a record of the taxpayer's identity. We're actually calling about a delinquent account. Now, there's no paper at all in that operation. An employee who is talking to the taxpayer is addressing a computer screen with a keyboard and the information is recorded—it's put into the computer.

It's almost on the cutting edge on the technology in terms of collection of delinquent accounts. We fear that this legislation might create a problem for us in that particular collection technique.

Bill?

Mr. WAUBEN. We have a number of small offices that are not manned all day during the normal work hours and we will put a recording device there hooked up to the phone, so if the taxpayer calls in looking for someone answering the phone, they will get a recording that they will be back at 3 o'clock, if you care to call back then, or leave your name and number and we will call you back.

Mr. CRANE. You mentioned your computer system when you're initiating the phone call. Then you're not notifying the individual, that taxpayer, that you're recording. Is that correct?

Mr. COATES. We do not notify the taxpayer that we're recording. Actually what we are doing, we are recording any information we receive from the taxpayer on the so-called history sheet of the taxpayer who owes the delinquent tax. In the past, that recording may have been by pencil and paper; today, it's by keyboard and goes into the computer where the taxpayer's account is displayed. But in terms of notifying the taxpayer that that's the procedure that we're using in recording the information we're getting, no, sir.

Mr. CRANE. Do you, or have you ever taped a taxpayer when you initiate the phone call with some area other than the computer system?

Mr. COATES. John, go ahead.

Mr. RANKIN. Well, in an instance where a tax examiner or a revenue agent or revenue officer may be assigned a civil enforcement matter regarding an illegal tax protester or someone else that has made threats or where we have reason to believe that person may make threats, it may not be a criminal investigation at that point—it's still a civil matter.

Mr. CRANE. What do you mean "threats"?

Mr. RANKIN. Threats with regard to the employee's safety. It is mentioned on page 8 as an example, but that's a situation where it may be determined that it's necessary to monitor a telephone conversation to protect that employee's safety in recording that threats were made. Those are very difficult cases to prosecute without having a direct recording of the threat, because if it's not recorded, then you have one person's word against another.

Mr. CRANE. But you're not notifying the other individual that he's being taped?

Mr. COATES. No; it's one individual, the party that is called, is aware of it, it's a one-party. We could cite several examples, Mr. Crane, along those lines in terms of an alleged employee bribe, that the telephone again would be used to verify that type of thing, and some of those examples are cited in my statement. But again, that's consensual, or one-party approval, one party knows that the recording is taking place.

Mr. CRANE. No further questions. Thank you.

Mr. GILMAN. Just one other question.

I was looking ahead at some of the proposed testimony by the National Treasury Employees Union, and while they recognize the need to monitor the service aspects, they are concerned about the privacy aspects. They are concerned about the atmosphere, and they make a statement that Service monitoring may be a genuine activity, but there is an increasing necessity to safeguard their protection from abusive authority. Without such safeguards they fear the result of providing service monitoring authority would soon lead to employees and perhaps the innocent members of the public to suffer a chilling effect of working in a think-speak environment.

Do you want to make any comment with regard to that situation?

I assume now you are monitoring employee internal conversations within your own agency with regard to work of the employees.

Mr. COATES. With regard to the Automated Collection System, that—

Mr. GILMAN. Well, beyond the Automated Collection System.

Mr. COATES. And the taxpayer service.

Mr. GILMAN. You're monitoring for service purposes, but I assume you're also monitoring whether there's any violation by any of your employees from time to time. Is that correct?

Mr. COATES. We would be monitoring again for accuracy in terms of tone, cordiality and that type of thing.

Mr. GILMAN. What about beyond quality? Do you monitor occasionally to see if—

Mr. COATES. For performance?

Mr. GILMAN. Yes.

Mr. COATES. Yes, for performance, particularly in ACS. And to my understanding, Bill, that has been a negotiated—

Mr. WAUBEN. Negotiated agreement with MT on that.

Mr. GILMAN. Do you think this should be subject then to collective bargaining to discuss the guidelines for any internal monitoring of employees?

Mr. COATES. Well, we have recently with the Automated Collection System, which is a new system. We did negotiate with the National Treasury—

Mr. GILMAN. I'm not talking now about the Automated Collection System. I'm talking about internal monitoring of an employee's manner of performance, whether he's performing something properly or illegally.

Mr. CRANE. What about a bribe?

Mr. GILMAN. And potentially of any crime. Should the employee be placed on notice?

Mr. COATES. Let me see if I can set the bribe situation that you're speaking of.

Ordinarily when there's an overture or an offer of a bribe, our employee comes and reports that to his supervisor. Really, he reports it to our inspection service, and the inspection service does the investigating, but that employee is well aware that if there is a phone call made from that employee back to the taxpayer or to the practitioner who makes that overture, the employee is aware of it.

Mr. CRANE. What if the employee is working within the bribe and doesn't come and notify you, do you then go through a taping process?

Mr. COATES. If the employee doesn't come forward and notify—

Mr. CRANE. Assuming the employee has been bribed and is taking a bribe, what do you do then?

Mr. RANKIN. If we have an allegation and there is a subsequent conversation between the briber and the employee and the employee does not consent, then you have an interception that comes under title III of the Omnibus Crime Control Act. Title 26 violations were not included under that act, and thus—well, we don't do that type of nonconsensual monitoring.

Mr. GILMAN. You don't do nonconsensual monitoring of an employee performance?

Mr. RANKIN. Well, now, you're talking about two different things, employee performance versus the criminal.

Mr. GILMAN. Let's assume that there's no allegation of a crime. Do you do any nonconsensual taping or monitoring of internal affairs?

Mr. COATES. With respect to an employee's performance, outside the area we've talked about, I'm not aware of any, Mr. Gilman.

Mr. RANKIN. I'm with criminal investigation, I'm not with inspection.

Mr. COATES. Again, getting back to the specific example that Mr. Alt raised that occasionally a supervisor might, if an employee had been identified as not really measuring up, that there might be some monitoring.

Mr. GILMAN. You do that kind of monitoring?

Mr. COATES. Walt, am I correct in making that statement?

Mr. ALT. That's part of the manager's responsibility, if there is that problem, to see if there is a way to help that employee with training or what have you, they could monitor some of the individual's calls.

Mr. GILMAN. You make that actually a responsibility of the manager then?

Mr. ALT. Yes, sir, the manager of the individual.

Mr. WAUBEN. Let me respond further to your question.

I was in one of our collection sites in Philadelphia Tuesday morning, extensive monitoring is going on in there. I sat in on a training session there where several managers who had been monitoring telephone calls had gotten about a dozen employees together and had a list of problems they had been hearing on the phone of not being responsive to taxpayers' questions, not using proper procedures. And what they did for about 30 minutes was to go through

this and say "folks, this is what we're hearing in the monitoring going on." Most of our monitoring would be aimed at that type of thing.

There's another telephone conversation I monitored where one of our employees plainly didn't understand what he was there for. In talking with the managers, they said they had monitored him enough and had already identified him and in fact had made a decision to recycle him back through some training to bring his performance up to an acceptable level. That is within the ACS site itself.

Mr. GILMAN. Are your employees then on notice that they will be monitored from time to time in all functions that they perform?

Mr. ALT. The phones are actually labeled that this phone may be monitored.

Mr. GILMAN. All of your phones are labeled?

Mr. ALT. Where we do the monitoring, yes, every one is labeled.

Mr. COATES. Only where the monitoring takes place.

Mr. ALT. Yes, every one is labeled.

Mr. GILMAN. Only where the monitoring is.

Do you monitor in other areas where you don't place them on notice?

Mr. ALT. No, not in my division.

Mr. COATES. I'm not aware of any monitoring would take place where the employee is not aware of it or it's a matter of course that monitoring takes place.

Mr. GILMAN. Thank you.

Mr. ALBOSTA. Thank you, gentlemen, for being here with us this morning. We sure appreciate your testimony and look forward to the answers that we have requested for our guidance. Thank you very much.

The committee will take a short recess of about 3 minutes.

And our next witness will be Mr. Paul Newton, who is legislative director of the National Treasury Employees Union.

I ask for unanimous consent before we recess that we enter into the record a statement by Mr. Jack Brooks, who is chairman of the Government Operation Committee and shares our convictions on this legislation with us.

Without objection, Mr. Brooks statement will be entered into the record.

[The full statement of Hon. Jack Brooks follows:]

STATEMENT OF CONGRESSMAN JACK BROOKS

Mr. Chairman, I want to take this opportunity to present my views to the Subcommittee on Human Resources regarding H.R. 4620, the Federal Telecommunications Privacy Act of 1984, which I authored. These hearings offer a further opportunity to review agency practices in secretly recording private conversations and I commend your efforts in this area. As you know H.R. 4620 is a result of public disclosures that the Director of the U.S. Information Agency (USIA) established a system to record his telephone conversations—often without the consent of other parties.

Subsequently, an investigations undertaken by the Committee on Government Operations found that regulations promulgated by the General Services Administration (GSA) prohibiting this type of activity were being largely ignored by Federal agencies. Although advised of these regulations, the Director of the USIA publicly stated that he decided to ignore them since they had no teeth. Clearly, without enforcement provisions, these regulations are not a deterrent against secret recording

by Federal officials. Notwithstanding, such activity without the consent of all parties violates the mutual trust and confidentiality implicit in any private conversation. In my view, it is an improper activity and a violation of the ethical standards expected of all government employees and cannot and should not be condoned.

H.R. 4620 provides a remedy to this problem by making these activities a criminal offense except under very limited and well defined circumstances. To briefly summarize the bill, it allows the listening-in upon or recording of conversations when the prior consent of all parties is obtained. It also allows such activity with the consent of one part when conducted for the purposes of law enforcement, counterintelligence, military command center monitoring, counter-terrorism outside the United States, public safety, assisting handicapped employees and service monitoring.

Federal officials who violate the provisions of this bill would be liable for (1) fines not exceeding \$10,000 and/or imprisonment for not more than one year, and (2) loss of employment. The bill also makes each recorded conversation a Federal record and, under current law, any unauthorized removal, destruction, of alteration of a Federal record is punishable by a fine of up to \$2,000, imprisonment of up to three years, forfeiture of public office and disqualification from holding any further office.

Although hearings were held by Government Operations Committee over three months ago, I understand some agencies are just now coming forward to criticize the bill. These agencies are asserting that this legislation is not needed—that they need more flexibility. Well, I want to point out that this legislation is based upon the GSA regulations which have been in effect for over three years, since March of 1981. Prior to that, the regulations were subject to close scrutiny by these same agencies through a lengthy and thorough review process. Further, H.R. 4620 provides the necessary exemption for those legitimate activities that are authorized and conducted in accordance with applicable law. H.R. 4620 does not, however, in any way authorize or provide any statutory support for any activity not conducted within the scope of of current law. Given the assertions that have been made, perhaps a further investigation of these agencies is needed to determine what, if any, activities are being conducted outside of current law.

Clearly, there is a major distinction between recording conversations for law enforcement and other established purposes and the recording of conversations by Federal officials for their own use or for unauthorized illegal activities. In this regard, I firmly believe that H.R. 4620 provides the necessary strong measures to ensure that Federal officials do not resort to the abusive practice of secretly recording telephone conversations.

Mr. ALBOSTA. Our next witness is Mr. Paul Newton, legislative director for the National Treasury Employees Union.

Mr. Newton, we will be glad to hear your testimony this morning. You can read your full text, or you can summarize your testimony.

STATEMENT OF PAUL NEWTON, LEGISLATIVE DIRECTOR, NATIONAL TREASURY EMPLOYEES UNION

Mr. NEWTON. Thank you, Mr. Chairman.

I will highlight my brief statement in the interest of time, and just really carry on the discussion of the previous witnesses in terms of our concerns regarding service monitoring.

For the record, I am Paul Newton, director of legislation from the National Treasury Employees Union.

NTEU is the exclusive representative of over 120,000 Federal employees, including all the employees of the Internal Revenue Service.

It is a pleasure to appear before you today to discuss H.R. 4620.

The NTEU strongly supports the enactment of H.R. 4620, and we generally agree with the Committee on Government Operations, that the listening in upon and recording of private conversations is improper and a violation of ethical standards normally expected of all Government employees.

We do have some concerns with certain provisions of the bill that relate to the work environment and the protection of employees from abuse.

While the emphasis of the bill is on law enforcement and intelligence activities, we are particularly concerned with a seemingly innocuous exemption for Service monitoring.

Without adequate controls and enforcement mechanisms, the monitoring of employees' telephone conversations for whatever purpose could lead to abuse.

The bill allows Service monitoring after an agency head or designee analyzes alternatives, determines in writing that such monitoring is required to effectively perform the agency mission, designates monitors in writing, and issues minimum written policies for monitors to follow.

We believe there is a legitimate purpose for Service monitoring; and, indeed, reference was made by the earlier witness that in our negotiated contract with the Revenue Service, it is part of our negotiated contract in terms of monitoring the employees in the taxpayer service and, indeed, specific terms in our contract on the automated collection systems.

Our concerns in enacting this legislation goes to the basic law that would be enacted and fully protecting the employees from potential and possible abuse, though we are saying that it has been abused in the past.

We believe there is legitimate purpose for Service monitoring. Such Service monitoring is adequately described in a note in House Report 98-815, part 1: "An agency monitors telephone conversations to ensure information provided to the public by its employees is accurate and given in a polite and cordial manner."

Now, our concern that this legitimate purpose be adequately safeguarded is highlighted by the comment of the Department of the Treasury on this particular section of the bill where they state:

The Treasury would prefer a specific exemption for monitoring to evaluate employee telephone performance, and to identify other personnel-related problems.

Now, the not-so-subtle distinction is the preference to monitor employees, to evaluate performance and to identify other personnel-related problems and not just to monitor service as described by the House report.

Though we agree with the Service-monitoring requirements of the bill, we recommend that they be more inclusive by requiring a notice in writing to each employee whose telephone conversations may be subject to monitoring, and that the agency's written policies, as proposed in the legislation for Service monitoring, be subject to collective bargaining.

Finally, we are concerned that the bill only provides for criminal penalties for violations of the prohibitions. Because of our concern over protections for employees who could be harmed by violations, we urge the subcommittee to consider specific authority to sue for monitor and equitable relief in a civil action which is similar to remedies available under the Privacy Act.

That concludes my testimony, Mr. Chairman. I would be happy to answer any questions you may have.

[The full statement of Paul Newton follows:]

STATEMENT OF PAUL NEWTON

Mr. Chairman and members of the subcommittee, I am Mr. Paul W. Newton, Director of Legislation of the National Treasury Employees Union. NTEU is the exclusive representative of over 120,000 Federal employees, including virtually all employees of the Internal Revenue Service. It is a pleasure to appear before you today to discuss H.R. 4620, a bill to prohibit the recording of conversations made on the Federal telecommunications system and for other purposes.

H.R. 4620 would amend the Federal Property, and Administrative Service Act of 1949 by adding a new section to Title I that would prohibit the listening-in upon or the recording of telephone conversations by Federal officers and employees without the consent of all parties. The bill does, however, allow for the listening-in upon or recording of telephone conversations with the consent of only one party when it is conducted for the purposes of, inter alia, assisting handicapped employees and "service monitoring." In allowing these activities, the bill requires strict administrative and procedural requirements for agencies to follow when the consent of only one party to the conversation has been given. Finally, H.R. 4620 provides that any Federal officer or employee who violates the prohibition shall be fined not more than \$10,000 or imprisoned for more than one year, or both, and shall forfeit employment with the United States.

Mr. Chairman, the NTEU strongly supports the enactment of H.R. 4620 (yet at the same time, it is a sad commentary on the integrity of government officials that this legislation must be considered at all). We agree with the Committee on Government Operations that the listening-in upon or recording of private conversation is improper and a violation of ethical standards normally expected of all government employees.

We do have some concerns with certain provisions of the bill that relate to the work environment and protection of employees from abuse. While the emphasis of the bill is on law enforcement and intelligence activities, we are particularly concerned with the seemingly innocuous exemption for "service monitoring". Without adequate controls and enforcement mechanisms the monitoring of employee telephone conversations for whatever purpose could lead to abuse. The bill allows "service monitoring" after an Agency head (or designee) (1) analyzes alternatives; (2) determines in writing that such monitoring is required to effectively perform the agency mission; (3) designates monitors in writing, and; (4) issues minimum written policies for monitors to follow.

We believe there is a legitimate purpose for "service monitoring". Such service monitoring was adequately described in a note in House Report 98-815, Part 1 as "... when an agency monitors telephone conversations to ensure information provided to the public by its employees is accurate and given in a polite and cordial manner." Our concern that this legitimate purpose be adequately safeguarded is highlighted by the comment of the Department of the Treasury on this particular section of the bill where they state: "The Treasury would prefer a specific exemption for monitoring to evaluate employee telephone performance and *identify other personnel-related problems*." (emphasis added) The not so subtle distinction is the preference to monitor *employees* to evaluate performance and to identify other *personnel related problems* and not just to monitor *service* as described in House Report 98-815, Part 1.

Though we agree with the service monitoring requirements of the bill, we recommend that they be more inclusive by requiring a notice in writing to each employee whose telephone conversation may be subject to monitoring and that the agency's written policies for service monitoring be subject to collective bargaining.

Finally, we are concerned that the bill only provides for criminal penalties for a violation of the prohibitions. Because of our concern over protections for employees who could be harmed by violations, we urge the Subcommittee to consider specific authority to sue for monetary and equitable relief in a civil action similar to remedies available under the Privacy Act.

In summary, let me conclude by saying that "service monitoring" may be a legitimate activity but there is an increasing necessity for safeguards and protection from abuse of authority. Without such safeguards I'm afraid the result of providing service monitoring authority could soon lead to employees, and perhaps the innocent members of the public, suffering the chilling effect of working in a "thinkspeak" environment.

Mr. Chairman, this concludes my testimony. I would be happy to answer any questions.

Mr. ALBOSTA. Thank you very much, Mr. Newton.

You indicated that you favor remedies such as those provided in the Privacy Act.

Does that mean you would oppose other approaches to try to reach the same end?

Mr. NEWTON. No, we would not oppose other approaches. There may be, in terms of investigatory matters and the end result in an investigation, administrative procedures where an employee believing they have been harmed by a monitoring of their telephone conversation filed a complaint or a grievance that followed the normal administrative grievance procedures, either an agency's grievance procedures or a negotiated grievance procedures or going before the Merit System Protection Board, we would not oppose administrative remedies.

Mr. ALBOSTA. Thank you very much. Do any members have any questions?

Mr. CRANE. I'd like to ask one question.

You were concerned over the fact that it might lead to abuse?

Mr. NEWTON. Yes.

Mr. CRANE. And I think you went on to say that you did not know of any abuses that had taken place. Is that correct?

Mr. NEWTON. Yes.

Mr. CRANE. So to this point you feel that no abuses have taken place?

Mr. NEWTON. That's correct.

The taxpayer service monitoring that is going on now, there is approximately 4 percent of the telephone conversations that are being monitored. We know of no abuses of that monitoring.

Our testimony is, when you are framing a statute you want to cover all of the bases in terms of the potential for abuse. We are not alleging there are abuses that have occurred.

Mr. CRANE. I think you made mention you had some concern over the reasons for personal reasons to monitor.

Can you give any specifics or anything of great concern along those lines?

Mr. NEWTON. From a standpoint that many of the employees in the taxpayer service are union employees, are members of the bargaining unit and subject to the contract, we would be concerned if there were monitoring of telephone conversations that related to union business, where employees having had their telephone conversations monitored would be talking about union business or something that related to the union that would be used against them by the agency.

There would be other instances, I believe, of possibly building a case file on an employee, where they would pay particular attention to a single employee, to monitor that person's phone conversations to build a file. It is that kind of intent and other related personnel problems that we see the potential, as the department has written, that we think ought to be pre-prescribed.

Mr. ALBOSTA. The gentleman from California, Mr. Bosco.

Mr. BOSCO. Thank you, Mr. Chairman.

I have just a couple of questions. I wasn't clear in your testimony what you thought should be subject to collective bargaining.

Mr. NEWTON. Yes; in the bill itself, one of the requirements of the agency would be to issue written policies, written policies for the monitors to follow.

There are some minimum requirements; one of which is that the phone itself be labeled—this is specified in the legislation. We believe that the policies as an agency policy, an agency regulation that relates to the working environment, working conditions of the employees, that those policies ought to be subject to collective bargaining, and that the written policies of the agencies be negotiated as part of our contract as opposed to just an agency regulation that would be implemented.

It is those agency policies, written policies that monitors have to follow that we would be, in our testimony, that we would believe would be subject to those requirements.

Mr. BOSCO. So that in the collective-bargaining process you could decide what telephones were subject to privacy and which ones weren't and under what circumstances?

Mr. NEWTON. We would be more concerned with the extent to which employees' performance would be rated based on monitoring. We would be concerned with what constitutes the statistically valid sample of monitoring in terms of numbers of phone calls to get a broad scope of all employees and the information that they were providing.

We would not be so much concerned with the numbers of telephones, that would be a management decision, or the numbers of monitors that they would have. It would be more the use to which they make of the monitoring.

Mr. BOSCO. Nor would you be concerned with eliminating monitoring altogether, I assume?

Mr. NEWTON. No, we would not be concerned with that.

Mr. BOSCO. Just the nature of how that information is used and under what circumstances?

Mr. NEWTON. That's right.

Mr. BOSCO. Thank you.

Mr. ALBOSTA. I would remind the members that we do have a vote on the House floor and that we have a 5-minute vote to follow that and that we have one more witness. Are there any more questions of the gentleman?

Mr. CRANE. May I have one more question?

Mr. ALBOSTA. The gentleman from Illinois.

Mr. CRANE. Do you have any concerns of GSA oversight responsibility to monitor?

Mr. NEWTON. Not to monitor in the sense that where the bill provides GSA monitoring the agency's program every 2 years.

I would have concerns as far as GSA being the investigative body of violations of the policies. That does concern us. But not in terms of GSA having oversight of making sure the agencies are following the right guidelines.

Mr. CRANE. No further questions. Thank you.

Mr. ALBOSTA. We thank you, Mr. Newton, for your testimony. We appreciate it very much.

Mr. NEWTON. Thank you.

Mr. ALBOSTA. We will have our next witness, Dennis Hays, President of American Foreign Service Association.

If you could summarize your testimony, I will try to get over to make my vote.

STATEMENT OF DENNIS HAYS, PRESIDENT, AMERICAN FOREIGN SERVICE ASSOCIATION

Mr. HAYS. Thank you, Mr. Chairman.

With your permission, I will submit my written statement and very briefly summarize.

Mr. ALBOSTA. Without objection, your full statement will be entered into the record.

Mr. HAYS. Thank you.

Very quickly, I have a number of things that were brought up today that I would like to comment on. First is the allegation that this bill discriminates against Federal employees.

As Mr. Newton said, and certainly as far as the 12,000 men and women in the Foreign Service are concerned, we support this testimony wholeheartedly. We see this as protection.

Second, I think that there was a lot of, quite frankly, nitpicking going on by some of the administration witnesses.

The question here is not whether someone is trying to stop legitimate concerns, it's illegitimate concerns that we are worried about.

I don't believe that anyone could characterize the sorts of events that led up to these hearings as being legitimate, and that's what we're trying to focus on and prevent.

Third, the existing regulations that GSA has in place that we have heard so much about, quite frankly do not work. They're not effective, they did not prevent this sort of action from happening in the past and they won't prevent them in the future. We feel that further legislation, such as this bill, is required, is mandatory.

Fourth, there was also an analogy made that this is a breach of trust, that it's similar to telling a secret to somebody and then having them tell on you. Well, we reject that, if for no other reason than that private conversation is deniable, it's reliance on a person's memory.

A tape is something that's very different again; it's there, it's your voice, it's hard evidence.

For instance, yesterday, I heard Ms. Toensing, if my memory serves me correct, say that they supported legislation that would apply only to phone conversations. Today, it seemed to me that she said that they wanted to extend it past phone conversations. That may be faulty memory. We will get the transcript and find out. But that's exactly the point that I'm making, that it's not a question of memory here, it's a question of something that's there on tape and it's not deniable.

The last point that I will make is that from our perspective, as members of the Foreign Service, we feel that the United States has an initiative; we represent a free and open society based on respect and trust for our fellowman, and that an operation like this seriously damages us, damages us both with our own people, our own American citizens, and particularly damages us overseas.

In the last couple of days, we have asked our people overseas to try to collect news stories or editorials which have played up these events and how they reflect on the United States as a whole. And,

certainly, I'd like an opportunity when we get to that to submit that for the record.

Mr. ALBOSTA. We would appreciate that, and we would make those editorials or whatever the articles are a part of the record.

Mr. HAYS. Yes, sir. Thank you.

To sum up, I would say that we feel that the activity that, again, has led up to this is wrong, is morally wrong, it's ethically wrong. We feel that it's also very dangerous. It's dangerous to the people who record it, and it's also dangerous to the people doing the recording, it can tend to corrupt them.

We think it damages us as a Nation and reflects poorly on us as an open and free society. And lastly, we believe that the committee should act and this should not be seen as a breach of trust, but as a violation of law.

Thank you.

[The full statement of Dennis Hays follows:]

STATEMENT OF DENNIS HAYS, PRESIDENT, AMERICAN FOREIGN SERVICE ASSOCIATION

Mr. Chairman, on behalf of the American Foreign Service Association, the professional representative of the career foreign service for 60 years, I am grateful for the opportunity to appear before you today and present testimony in support of H.R. 4620, a bill to prohibit the recording of conversations made on the Federal Telecommunications System.

The public has every right to expect ethical and lawful behavior on the part of its elected and appointed officials, and to be assured that violations will be punished by appropriate means. We have recently witnessed an episode, however, that threatens the credibility of not just the individuals involved, but the entire nation. We have learned that Mr. Charles Z. Wick, Director of the United States Information Agency, regularly recorded telephone conversations over a period of years, in many cases without informing the taped party. Mr. Wick explains his actions as taken in the interest of bureaucratic efficiency and historical necessity, but these cannot justify violations of individual privacy.

Mr. Wick took these actions notwithstanding existing General Services Administration regulations prohibiting recording of phone conversations where all of the parties to the conversation do not give prior consent. According to a GSA report, Mr. Wick was advised by his staff that his actions were inconsistent with these regulations. Nonetheless, he continued to tape or have secretaries listen in and take notes on phone conversations. The fact that an individual can knowingly violate regulations and suffer no adverse consequences points to the need for the bill under consideration.

The reason that Mr. Wick could continue to blatantly violate GSA regulations despite warnings from his staff is that, as Mr. Wick recognized, the regulations have "no teeth." Unless Congress enacts legislation to make violation of these regulations punishable, government officials will be able to ignore these prohibitions.

As representatives of the United States Foreign Service, we are particularly sensitive to the effect of Mr. Wick's actions on the way America is perceived overseas. The men and women of USIA have striven for three decades to create and manage an information agency that would have international credibility. Mr. Wick presides over the instrument with which the United States government communicates its policies to the rest of the world. The image of the United States will of necessity suffer if we cannot be assured that the highest standards of professionalism and ethical conduct are expected of our elected and appointed officials, and enforced by laws and regulations—with teeth.

There are circumstances under which recording of telephone conversations by government employees is legitimate. This bill recognizes these exceptions and provides for recording for law enforcement, counterintelligence, public safety, and other purposes. In addition, it provides that all parties may agree to tape a conversation. This might be done in the interest of recordkeeping or historical purposes. Apart from these legitimate uses of tape recording, there can be no justification for surreptitious or nonconsensual taping.

The bill before you provides some deterrent to this unethical and unlawful behavior. Unless the bill is amended to impose criminal sanctions for wilful violation of its provisions, however, we question the effectiveness of that deterrent.

We would also urge the Committee to examine legislative provisions to compensate individuals whose privacy rights are violated by federal employees acting in violation of law. A federal employee who is wrongfully taped might well suffer injury to his personnel record as a result of information gained from taped conversations. That individual should have the express right to exercise administrative recourse such as filing a charge with the Merit Systems Protection Board. He should be able to have his file cleansed and be made whole for any injury to his employment status arising from the material wrongfully placed in his record. Similarly, an individual should be able to seek civil relief from the United States government under the Federal Tort Claims Act. Under this procedure, he could obtain monetary damages to compensate for the violation of his right to privacy. Of course, the individual would bear the burden of proving the extent of damages.

The enactment of H.R. 4620 will assure the public that their elected and appointed officials will be held to the high standards appropriate to their offices. The very mission of the United States government depends on this assurance, and we urge this Committee to take favorable action on the bill before it.

Mr. ALBOSTA. If it's of any reassurance to you, Chairman Brooks of the Government Operations Committee has entered a statement into the record for this committee and has recommended that we go forward with this legislation as fast as possible and he supports it wholeheartedly.

Mr. HAYS. Thank you.

Mr. ALBOSTA. We have no questions.

We thank the witnesses for being here this morning very much.

The committee is adjourned.

[Whereupon, at 11:30 a.m., the committee adjourned.]

[The following statement was received for the record:]

STATEMENT OF DAVID S. BURCKMAN, PRESIDENT, SENIOR EXECUTIVES ASSOCIATION

Mr. Chairman, we are pleased to appear before you today to testify concerning the proposals set out in H.R. 4620, the "Federal Telecommunications Privacy Act of 1984".

We have examined in some depth the provisions of H.R. 4620, and also the positions of the various federal agencies on this bill, including those of the Department of the Treasury, Central Intelligence Agency, and the Department of Justice.

Many of the objections voiced by the agencies raise very real issues about their ability to operate under the provisions of the bill. For example, the Internal Revenue Service often uses telephone monitoring of taxpayer assistance calls in order to ensure that proper information is provided to the public who seek answers to their tax questions. Each year service is "graded" by many newspapers around the country. Wrong answers are pointedly criticized. It is in the best interest of the government and the public that taxpayers be given correct answers. This kind of monitoring would seem to promote the interest of all parties. Monitoring is also utilized in the collection function of IRS with the automatic call distribution system. Occasional monitoring of this function helps to ensure that the taxpayer is treated properly. As written, this bill would prohibit such action.

The purpose of the bill should be to establish civil and criminal penalties against those who violate current law. We think that such a purpose is laudable. It would have many effects. If civil and criminal penalties were imposed for improper monitoring and recording by the government, then agencies would clarify exactly what is proper and improper monitoring or taping of telephone conversations, without consent of all parties. We do not believe that current law is necessarily deficient, but we do know that many federal employees do not know what that law is.

However, we emphatically believe that individual employees should not be subjected to criminal or civil penalties so long as they are acting within the "scope of their employment". That term is well known and utilized by the agencies and the courts in determining, under the Federal Tort Claims Act, when an employee can be held personally liable.

Monitoring and taping of telephone conversations by the government can be an invasion of privacy by which citizens and government employees can be substantial-

ly harmed. However, there are instances when it is necessary, in order to provide proper governmental services, or for law enforcement. Those who willfully abuse the current restrictions in law and regulation should be subjected to some kind of penalty. However, if a government employee is an inadvertent violator, and he or she is acting within the scope of their employment, obviously no civil or criminal penalty should be sought against that employee. If a citizen is harmed by the government employee's mistaken action, then a suit could be brought against the government for any damages incurred. If, however, the employee's actions were knowing and willful violations of law, then they would stand in the same situation as any other citizen for violating the law. Their actions would not be within "the scope of their employment".

The Department of Justice makes scope of employment determinations on a daily basis in civil suits filed against individual federal employees. If it finds that the employee was acting within the scope of employment, then the Department of Justice defends the case, and seeks to substitute the United States as the defendant. If not, then the Department of Justice will not represent the employees. It seems logical that an agency which has so much experience in making these determinations continue to make them in cases involving unauthorized telephone taping or monitoring. Therefore, we believe any sanctions should be preceded by a "scope of employment" determination by the Department of Justice if the proposed sanction involves a federal employee.

In sum, we support what we understand the purpose of the legislation to be, i.e., to enact penalties which can be utilized to enforce current law and regulation. We agree with many agency concerns that the bill, as currently written, could inhibit some agencies' to operate. Finally, we believe that government employees who are acting within the scope of their employment should be protected from any personal liability. Any liability which incurs should be that of the federal government in those situations.

Thank you for this opportunity to appear and testify before you. I will be happy to answer any questions you might have.