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Mr. Charles D. Ferris
Chairman, Federal Communications
Commission
Washington, D. C.

Dear Mr. Ferris:

This responds to your letter of September 21, 1979 requesting our opinion on several questions relating to whether the Federal Communications Commission (FCC) may monitor radio frequencies on behalf of law enforcement agencies and whether a violation of law applicable to such monitoring by FCC personnel would give rise to a private cause of action. 1/ We have concluded, inter alia, that the FCC may only monitor radio frequencies in order to investigate violations of the Communications Act of 1934, 47 U.S.C. §§. 151 et seq. (Communications Act), and that a private cause of action may lie against the FCC and its personnel for violations of laws applicable to such monitoring.

I. ASSISTANCE TO LAW ENFORCEMENT AGENCIES

- A. The FCC may monitor radio transmissions in order to enforce the Communications Act and may disclose violations of the criminal law discovered during such monitoring.

The Communications Act forbids the monitoring of radio transmissions except as provided in 47 U.S.C. § 605. 1/

1/ This inquiry was supplemented by your letter of February 8, 1980 in response to our letter of October 23, 1979.

2/ Title 47, section 605 states:

Except as authorized by chapter
119, title 18, United States Code
no person receiving, assisting in

(continued):

The courts, however, have found that the FCC has the implicit authority to intercept radio transmissions in order to enforce the Communications Act. United States v. Sugden, 226 F.2d 281, 285 (9th Cir. 1955), aff'd per curiam, 351 U.S. 916 (1956). See also 47 U.S.C. § 154(g). As a result, the FCC may disclose information it overhears that involves a crime without violating § 605:

We think here that unless the Congress orders otherwise, the exclusionary rules . . . are to be applied to listening in on non-public broadcasts by both private individuals and all public officers save

2/ (continued)

receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, . . . [except] on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning

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in connection with the Federal Communications Commission's necessary policing for violation of the act. And in connection with such policing, information can be used no further than to effect the policy of the act by criminal prosecution thereunder or by use of other appropriate procedures.

Sugden, supra, 226 F.2d at 285. 3/ See also 18 U.S.C. § 2511(2)(b) (1976) (FCC may disclose wire communication or oral communication transmitted by radio). We have previously come to this same conclusion. "FCC personnel [may] divulge possible violations of the law, overheard in the normal course of their duties, to law enforcement officers" without violating § 605. 4/

2/ (continued)

of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

3/ Radio transmissions involving illegal unlicensed operation are not protected by § 605. The operators are not covered because they have no right to be on the air. See United States v. Clegg, 509 F.2d 605, 612 (5th Cir. 1975); Hanna v. United States, 404 F.2d 405, 407-408 (5th Cir. 1968), cert. denied, 394 U.S. 1015 (1969); Sugden, supra, 226 F.2d at 285; In re James Reston, Jr., 72 F.C.C.2d 662, 668, aff'd sub nom. Reston v. FCC, No. 79-2476 (D.D.C. May 30, 1980) (Reston); United States v. Beckley, 259 F. Supp. 567, 572 (N.D. Ga. 1965).

4/ Letter to Honorable Richard E. Wiley, Chairman, Federal Communications Commission from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, September 15, 1975, at 3.

B. The FCC is not authorized to monitor specific radio frequencies at the request of law enforcement agencies

The major question raised by your letter is whether the FCC can use its monitoring capacity when asked to do so by law enforcement agencies, whether federal, state or local. We do not believe that the FCC's statutory authority can be read to permit such monitoring. Rather, we have concluded that the Sugden court correctly held that the FCC cannot use its facilities to engage in monitoring at the request of another agency. "In view of Section 605, we think that if Congress wants the Federal Communications Commission to go into the general crime detection business it should say so We shall not put [the] agency there by judicial construction." Sugden, supra, 226 F.2d at 285. Inclusion in FCC regulations of general prohibitions against violations of federal, state, or local law would not alter this analysis. Investigation of criminal offenses, unless specifically assigned to an agency, is vested in the Attorney General. 28 U.S.C. § 533; 28 C.F.R. § 0.85(a). Enforcement of the immigration laws, as in Sugden, for example, is his responsibility. 8 U.S.C. § 1103. Investigative authority rests with an agency "when investigative jurisdiction has been assigned by law to such departments and agencies." 28 U.S.C. § 533 (emphasis added). In the absence of such authorization, we do not believe that the FCC can include enforcement of other federal, state or local laws within the scope of its enforcement of the Communications Act. 5/

5/ The Economy Act, 31 U.S.C. § 686(a) (1976), does not change this analysis. The Economy Act permits government offices to "place orders with any other such department, establishment, bureau, or office for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render . . ." 31 U.S.C. § 686(a). The FCC is not in a position to render a service -- interception -- that it lacks the authority to do. The Economy Act does not give an agency any authority that it does not already possess. Memorandum for Honorable John H. Shenefield, Acting Associate Attorney General from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, January 17, 1980, at 2-3; Memorandum for Lloyd N. Cutler, Counsel to the President from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, November 20, 1979, at 11. See also 54 Comp. Gen. 624, aff'd 55 Comp. Gen. 578 (1975); 23 Comp. Gen. 935, 937 (1944); 18 Comp. Gen. 262, 266 (1938).

Monitoring would not be proper merely because the transmitters were "obtained or operated by, or licensed to, government undercover agents". Consent of one of the parties to the conversation is necessary to permit interception without violation of § 605. Rathbun v. United States, 355 U.S. 107 (1957); United States v. Hall, 424 F. Supp. 508, 518-20 (W.D. Okla. 1975), aff'd, 536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976). A party to a form of communication covered by 18 U.S.C. § 2510 et seq., such as a radio -- land-line telephone conversation, may also intercept the communication or give his permission for it to be intercepted. 18 U.S.C. § 2511(2)(c) and (d). These exceptions apply only when the agent participates in the communication, not when he merely owns or is licensed to operate a particular transmitter.

The question also arises whether the FCC may use a law enforcement agency's promise that it will prosecute any violations of the Communications Act detected by FCC monitoring as justification for monitoring designed to develop evidence of violation of other laws. Providing assistance under these circumstances would be neither routine nor, without some basis to believe violations of the Communications Act were occurring, done to enforce the Communications Act. So long as the FCC is engaged in routine monitoring, however, or in monitoring designed, in good faith, to develop evidence of a violation of the Communications Act, we believe the FCC may inform law enforcement agencies about violations of other laws. It is then the other agency's responsibility to develop its case independently. 6/

6/ Certain frequencies are assigned by the President to radio stations belonging to and operated by the federal government. 47 U.S.C. § 305(a). The FCC has no jurisdiction to regulate such stations. Rust Broadcasting v. FCC, 379 F.2d 480, 481 (D.C. Cir. 1967). Monitoring of government frequencies is done at the direction of the Interdependent Radio Advisory Committee (IRAC), which is headed by the National Telecommunications and Information Administration. Manual of Regulations and Procedures for Federal Radio Frequency Management, § 1.3.3, .4; § 1.4.2 (IV). The FCC presently monitors such frequencies when they are shared by both public and private radio stations or when there is interference with an FCC regulated frequency. Telephone conversation with James C. McKinney, Chief, FCC Field Operations Bureau, June 6, 1980.

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Nothing that we have found in legislative history of the 1968 amendment to § 605 alters this conclusion. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803 (1968) (Title III). Rather, we believe that Congress meant the amendment to establish that law enforcement agencies are not "persons" barred from listening to and divulging oral and wire communications. S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). Congress has authorized every federal law enforcement agency to intercept and divulge such communications -- so long as it is done pursuant to the strictures of 18 U.S.C. §§ 2510 et seq. See United States v. Juarez, 573 F.2d 267, 277 n.10 (5th Cir. 1978); United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973). Congress has, in short, not expanded the FCC's monitoring authority.

The exception to Title III which Congress gave to the FCC reinforces our conclusion that the FCC's monitoring authority is limited. Under Title III, FCC employees may monitor wire and oral communications over the radio "in the normal course of [their] employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of [the Communications Act]" 18 U.S.C. § 2511(2)(b). This authority to enforce the Communications Act, the same authority that was upheld in Sugden, is manifestly not the authority to monitor on behalf of other agencies. If it were, Title III would be consumed by the FCC's exception. There would be no incentive for law enforcement agencies to obtain warrants if the FCC's exception could be used on their behalf.

We believe, therefore, that Sugden's premise -- that the FCC lacks the statutory authority to monitor on behalf of

6/ (continued)

The FCC's implicit authority to monitor radio frequencies is a function of its power to enforce the Communications Act. Although the Communications Act's general provisions describing the FCC's powers, 47 U.S.C. § 301, 303, do not apply to government stations, 47 U.S.C. § 305(a), certain specific provisions do. See, e.g., 47 U.S.C. § 323, 324. The FCC's monitoring of government frequencies is permissible when done to enforce such sections.

other agencies -- remains valid. 7/ Disclosure of information obtained by such monitoring to the United States Attorney would not cure this lack of authority.

The FCC should, therefore, -- until Congress gives it the positive authority to do so -- generally decline to monitor, record or otherwise identify radio transmissions at the request of other agencies -- be they federal, state or local. 8/

7/ The FCC itself has conceded a continuing lack of statutory authority. In re Roberts Flying Service, Inc., 30 F.C.C.2d 823, 825 (1971). See also Reston, supra, 72 F.C.C.2d 662, 663 n. 3; FCC Memorandum to Field Supervisors, March 1, 1977, at 2-3; Right of Privacy Act: Hearings on S. 928 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., Part 2, at 516 (1967) (statement of Hon. Lee Loevinger, FCC Commissioner); Letter from James C. McKinney, Acting Chief, FCC Field Operations Bureau to L.E. Telfer, Commander, United States Coast Guard, April 12, 1976.

8/ Evidence obtained in violation of Title III may not be used in any legal proceeding. 18 U.S.C. § 2515. There is a limited exception when a private citizen obtains the information inadvertently. United States v. Axsella, 604 F.2d 1330, 1334-5 (10th Cir. 1979); United States v. Savage, 564 F.2d 728, 732 (5th Cir. 1977); Flournoy v. Wren, 498 P.2d 444 (Ariz. 1972) (en banc). The FCC should not use such information therefore, and it should not encourage any private citizen to indulge in illegal monitoring. Title III provides for a cause of action against any employee or agent of the United States who "procures any other person to intercept [or] disclose" communications in violation of Title III. 18 U.S.C. § 2520. Likewise, "evidence obtained by means forbidden by Section 605, whether by state or federal agents, is inadmissible in federal court." Benanti v. United States, 355 U.S. 96, 100 (1957). It is not clear whether this extends to information obtained in violation of § 605 by a private individual. As a general rule, "The government is not precluded from introducing improperly obtained evidence so long as it did not participate in the impropriety." United States v. Foley, 598 F.2d 1323, 1337 (4th Cir. 1979). In Bubis v. United States, 384 F.2d 643 (9th Cir. 1967), however, the court suppressed tape recordings obtained by the telephone company

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- D. The FCC is not authorized to provide directional finding for another agency except when the FCC has discovered a possible violation of the law during a routine monitoring done to enforce the Communications Act.

As we stated in an earlier memorandum, we believe that the FCC may ascertain and divulge the location of a radio transmitter when the interception and divulgence of the radio

8/ (continued)

in violation of § 605 and voluntarily given to the government. The court held that although the telephone company could monitor to obtain evidence that its property was being misused, monitoring for three months "after ample evidence had been secured of the illegal use" of the phone "was unreasonable and unnecessary. To sanction such practices on the part of the telephone company would tend to emasculate the protection of privacy Section 605 was intended to protect." Id. at 648. Two state cases have permitted introduction of privately obtained evidence when the individual overheard the conversation inadvertently. State v. McCartin, 342 A.2d 591 (Super. Ct. N.J. 1975); Roberts v. State, 453 P.2d 898 (Ala. 1969), cert. denied 396 U.S. 1022 (1970).

If there were no need to use the information in any legal proceedings, the FCC could use information given to it by a private citizen without itself violating § 605. There would be no violation if the FCC divulged the material because a § 605 violation requires interception and divulgence by the same person. United States v. Butenko, 494 F.2d 593, 600 (3d Cir.), cert. denied, 419 U.S. 881 (1974); Smith v. Cincinnati Post & Times-Star, 475 F.2d 740, 741 (6th Cir. 1973). The FCC might, however, wish to alert the individual to his possible criminal liability. 47 U.S.C. § 501. See Massicot v. United States, 254 F.2d 58 (5th Cir. 1958); Lipinski v. United States, 251 F.2d 53 (10th Cir. 1958); United States v. Fuller, 202 F. Supp. 356 (N.D. Ca. 1962) (radio). See also Strouth v. Western Union Telegraph Co., 70 F.C.C.2d 506 (1978) (damages under 47 U.S.C. § 208).

signals themselves would be permissible. ^{9/} If the FCC should routinely intercept a transmission which reveals a violation of the law, divulging the underlying communication would be permissible and we see no objection to disclosing the location of the transmitter. If the FCC should discover the existence of an illegal transmitter during the course of its routine monitoring, it can certainly disclose that fact and the location of the transmitter to law enforcement authorities. Since law enforcement officers are not "persons" under § 605, disclosure to them would not violate the law. Again, however, the difficulty is that the FCC lacks the authority to use its facilities for a purpose other than enforcement of the FCC's statutes by, e.g., doing directional finding at the request of another agency. The FCC should, therefore, decline to do so, unless such usage is also connected to good faith enforcement of the Communications Act.

II. LEGAL ACTION AGAINST THE FCC OR ITS EMPLOYEES

A private cause of action for violations of § 605 was recognized by the Second Circuit over thirty years ago. Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947) (L. Hand, J.).

Although the [Communications] Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.

162 F.2d at 694. The availability of an action for damages was one reason the Second Circuit later refused to interfere in a state court proceeding that would have used evidence

^{9/} Letter to Honorable Richard E. Wiley, supra note 3. The FCC must intercept radio signals when it does directional finding. Telephone conversation with James C. McKinney, Chief, FCC Field Operations Bureau, May 21, 1980.

obtained in violation of § 605. Pugach v. Dollinger, 277 F.2d 739, 743 (2d Cir. 1960), aff'd per curiam, 365 U.S. 458 (1961). See also Guido v. City of Schenectady, 404 F.2d 728, 730 (2d Cir. 1968), cert. denied, 395 U.S. 962 (1969) (damages not available for period when wiretap was permissible in state court). See also Spirt v. S.D. Bechtel, 232 F.2d 241, 250 (2d Cir. 1956) (Lumbard, J. concurring) (dictum). District courts have continued to hold that § 605 provides a cause of action. Home Box Office, Inc. v. Pay TV of Greater New York, Inc., 467 F. Supp. 525, 528 (E.D. N.Y. 1979); Huff v. Michigan Bell Telephone Co., 278 F. Supp. 76, 77-79 (E.D. Mich. 1967) (plaintiffs entitled to trial for damages); KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 43 (C.D. Ca. 1967); Simons v. O'Connor, 187 F. Supp. 702, 704-05 (S.D. N.Y. 1960) (State District Attorney entitled to immunity). 10/ The Supreme Court has never addressed this specific issue.

The standard for implying a private cause of action has become more fully articulated by the Supreme Court in recent years. Cort v. Ash, 422 U.S. 66, 78 (1975). One court has raised, without deciding, the question of whether Cort, supra, affects the Reitmeister opinion. Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672, 681 n.8 (S.D.N.Y. 1979). We believe that a private cause of action under § 605 would

10/ We would note that the Supreme Court has said, in dictum, that "The Communications Act of 1934 did not create new private rights." Scripps-Howard Radio Corp. v. FCC, 316 U.S. 4, 14 (1942). Based on this language, several courts have held that "a violation of the Act does not give rise to a private cause of action for damages or injunctive relief." Moro v. Telemundo Inc., 387 F. Supp. 920, 925 (D. P.R. 1974) (citations omitted). Reitmeister, decided five years later, does not mention Scripps. The Moro line of cases does not mention Reitmeister. Whether Reitmeister, therefore, which the Supreme Court, Wyandote Co. v. United States, 389 U.S. 191, 202 and n. 14 (1967), and the Second Circuit, Leist v. Simplot, No. 79-7402 (2d Cir., July 21, 1980), slip op. at 4051, continue to cite with seeming approval, is valid may be subject to some question.

most probably be held to meet the Cort test. ^{11/} The recent decisions of Touche Ross & Co. v. Reddington, 442 U.S. 560 (1979) and Transamerica Mortgage Advisors, Inc. v. Lewis, U.S. , 100 S. Ct. 242 (1979) (TAMA), however, place greater emphasis on Congress' intent to provide a private cause of action. We have, therefore, examined the legislative history of § 605. There is no discussion in the 1968 debates -- when the "new" § 605 was enacted -- of Reitmeister or private causes of action. We have, therefore, also examined the legislative history of the "old" § 605. ^{12/} The only relevant reference that we have discovered is in the 1912 debates. Rep. McCall denounced the secrecy provision -- which was only a skeleton of the present § 605 -- as unduly harsh:

It seems to me that it is an unusual proposition anyway. There is no provision making it a criminal offense for an operator to divulge a telegraphic message between the States. That would rest on general principles of right conduct, and parties interested in the message would have a ground for action for damages against the company. I believe that there is no more reason why we should thus protect the sending of messages through the air by a penal provision than we should when sending them by wire.

48 Cong. Rec. 10,596 (1912) (emphasis added). Rep. Alexander replied that it would be dangerous not to provide for the secrecy of radiograms. Id. He also stated that the Berlin

^{11/} 422 U.S. at 78. Reitmeister states that § 605 was enacted for the benefit of a particular class; Congress has not indicated, even when given the opportunity in 1968, any desire to deny the private cause of action; the Supreme Court has indicated that the private right of action under § 605 is consistent with enforcement of the legislative scheme, Wyandotte Co. v. United States, 389 U.S. 191, 202 and n.14 (1967); monitoring federally licensed radio communications is not an area traditionally relegated to state law.

^{12/} Section 605 can be traced through the various Radio Acts to 1912. 47 U.S.C. § 605 (1934); 47 U.S.C. § 107 (1928); 37 Stat. 302, 307 (Radio Act of 1912, § 4) (1913).

Radiotelegraphic Convention, for which the 1912 Act was the enabling legislation, required signatories to include such a provision in their laws. Id.; H. Rep. No. 582, 62d Cong., 2d Sess. 16 (1912). 13/ While this exchange is not free from ambiguity, it can be read as a recognition by Congress that a private cause of action already existed for an almost identical offense. Thus, Reitmeister would accord with Congress' perception that a cause of action for such disclosures already existed at common law. 14/

[W]hile the absence of anything in the legislative history that indicates an intention to confer any private right of action is hardly helpful to [a petitioner], it does not automatically undermine his position. This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably

13/ The United States is presently bound by international law to prohibit and prevent:

a) The unauthorized interception of radio communications not intended for the general use of the public;

b) the divulgence of the contents, simple disclosure of the existence, publication or any use whatever, without authorization, of information of any nature whatever obtained by the interception of the radio communications mentioned [above].

Art. 17, Radio Regulations, 12 U.S.T. 2377, T.I.A.S. No. 4893 (relied on in Reston, supra, 72 F.C.C. 2d at 669).

14/ Although § 605 had been greatly expanded by 1942, the legislative history of the 1934 amendments, H. Rep. No. 1850, 73d Cong., 2d Sess. 9 (1934), says little more than that they were based on the 1927 provision, which in turn was said to be a redraft of the existing law. S. Rep. No. 772, 69th Cong., 2d Sess. (1927).

inconsistent with an intent on its part to make such a remedy available. Cannon v. University of Chicago, supra, U.S. , 99 S.Ct., at 1953. Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.

TAMA, supra, 100 S. Ct. at 246.

We believe, therefore, that Reitmeister continues to be the controlling law. Home Box Office, Inc. v. Pay TV of Greater New York, Inc., 467 F. Supp. 525, 528 (E.D. N.Y. 1979). Section 605 falls within the group of statutes distinguished by Justice Rehnquist in Touche Ross, supra:

It is true that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one. But in those cases finding such implied remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private parties. By contrast, § 17(a) neither confers rights on private parties nor proscribes any conduct as unlawful.

442 U.S. at 569 (citations omitted) (emphasis added). Section 605 does prohibit certain conduct -- interception -- and it does so in order to protect those who use private radios. 15/

15/ The FCC has protected the privacy interests of radio users for many years. Section 605 "protects, not an expectation of full privacy, but an expectation that the user's message will not become generally public or be used to his detriment." Roberts, supra, 30 F.C.C. 2d at 825, citing Sugden (emphasis added). See also Reston, supra, 72 F.C.C. 2d at 666-67; Unauthorized Broadcast of FAA Communications by Broadcast and Other FCC Licensees, 23 Rad. Reg. (P & F) 2d 1720 (1972); Monitoring of Police and Fire Radio Transmissions.

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Further, the Supreme Court has indicated that the long acceptance by lower federal courts of an implied right of action is entitled to some weight. Touche Ross, supra, at 2490 n.19, citing Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n. 9 (1971). The Second Circuit recently used this reasoning to uphold a private right of action under the Commodity Exchange Act (CEA). Leist v. Simplot, No. 79-7402 (2d Cir., July 21, 1980), petition for rehearing denied, September 9, 1980. The question raised was whether Congress, when it amended the CEA in 1974, had affected the private right of action that the courts had previously recognized:

Whether rightly or wrongly in light of recent Supreme Court jurisprudence, the courts had read a private cause of action into the statute, just as they had done with statutes of similar import in related fields, and Congress knew that they had done so. The burden thus lies on those who urge that the 1974 amendments demonstrate an intention to change prior law, or, paraphrasing the language from Mr. Justice Powell's Cannon dissent, supra, that, in making the changes that it did,

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by Broadcast Stations, 1 Rad. Reg. (P & F) 2d 291 (1963); In re Knickerbocker Broadcasting Co., 7 F.C.C. 468, 469, 572 (1939). At least one court has come to a similar conclusion. United States v. Fuller, 202 F. Supp. 356, 359 (N.D. Ca. 1962) (unauthorized disclosure of contents of police and fire radio bands violates § 605). Cf. Lee v. United States, 392 U.S. 378, 381-87 (1968) (deliberate interception of party line phone conversation violated § 605 even though people on a party line may expect that their conversations will be overheard.) But cf. United States v. Hall, 488 F.2d 193, 196 n. 4 (9th Cir. 1973) (questioned whether citizen's disclosure to police of conversations she overheard on radio violated § 605).

Congress "absentmindedly forgot" to repeal the private cause of action. The silence of the 1974 Congress with respect to private causes of action for violations of the CEA, on which the dissent leans so heavily, is no more significant than the similar silence of the 1975 Congress which extensively amended the Securities Exchange Act, 89 Stat. 97. When, a principle has become settled through court decisions, there is no occasion for Congress to speak unless it wishes a change.

Slip op. at 4062 (footnote omitted). One of the "statutes of similar import" to which the court referred was § 605. Slip op. at 4051 (citing Reitmeister). We believe that there is a strong argument that a private right of action under § 605 remains available. 16/

III. CONCLUSION

We believe the FCC may engage in routine monitoring of radio communications in order to enforce the Communications Act of 1934, that it may not enforce the general criminal laws by monitoring radio transmissions at the behest of another agency, state or federal, and that monitoring in violation of Title III, § 605 or in disregard of its statutory

16/ One district court has stated flatly that "Section 605 does not grant any civil remedy to a person who has allegedly been injured as a result of a violation of that section." Smith v. Cincinnati Post & Times Star, 353 F. Supp. 1126, 1127 (S.D. Ohio 1972), aff'd on other grounds, 475 F.2d 740 (6th Cir. 1973). We are inclined to view this as an anomaly, since there is no analysis nor mention of the Reitmeister line of cases.

authority may render the FCC and its employees liable for damages in a civil suit. 17/

Sincerely,

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

17/ We note that an action against the FCC for exceeding its statutory authority is available under 5 U.S.C. § 702. We would further note that a claim of, for example, mental distress or invasion of privacy, might, depending on the law of the place where the injury occurred, lie against the FCC under the Federal Tort Claims Act. 28 U.S.C. § 1346(b). Cf. Birnbaum v. United States, 588 F.2d 319, 322-28 (2d Cir. 1978) (mail covers were invasion of privacy); Cruikshank v. United States, 467 F. Supp. 539, 543 (D. Hawaii 1979) (same). See n.15 supra. Finally, we would add that a violation of Title III may be a violation of the plaintiff's civil rights, 42 U.S.C. § 1983. Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979), aff'g, 453 F. Supp. 819 (D. Mass 1978).