

FILES
Mrs. Copeland ✓
Miss Lawton

NOV 10 1970

Honorable George U. Carneal, Jr.
General Counsel
Federal Aviation Administration
Department of Transportation
Washington, D.C. 20590

Wick 11/10

Dear Mr. Carneal:

This is in response to your letter of October 14, 1970 requesting our views as to whether there are any substantial legal difficulties involved in using devices to trace telephone calls. We understand that the devices contemplated are merely "tracers" and do not monitor the contents of telephone messages.

We perceive no legal difficulties in the use of tracers under constitutional or statutory law, nor are we aware of any FCC regulation affecting such devices. However, you may wish to inquire directly of the FCC as to whether they have or are considering a position on these devices.

Section 605 of the Communications Act (47 U.S.C. 605) prohibits interception and disclosure of wire communications. It does not define "interception" but the courts have indicated that "interception" in the context of this statute does not include actions which have the consent of one party to the communication. Rathbun v. United States, 355 U.S. 107; United States v. Littman, 421 F. 2d 981 (C.A. 2, 1970). In our view it is clear that section 605 would not apply to the tracing of telephone calls by, or with the consent of, the receiver of the calls.

The recent criminal provisions on wire interceptions (18 U.S.C. 2510-2520) define "intercept" as the aural acquisition of the contents of a communication. (18 U.S.C. 2510(4)). Moreover, interception with the consent of a

party is generally excluded from the operation of these provisions. (18 U.S.C. 2511(d)). Again, it seems clear that the statute does not apply to tracing by, or with the consent of, the receiver of calls.

On the basic constitutional issue there is some question since Katz v. United States, 389 U.S. 347 (1967), whether interception with the consent of one party may nevertheless violate the Fourth Amendment. However, the question has always arisen in the context of eavesdropping, i.e., the "seizure" of conversation. We are not aware of any case to date which suggests that the mere tracing of the location of a call somehow violates the Fourth Amendment rights of the caller.

Finally, we should note that the FCC has issued Public Notice 60591 which lays down the basic rules on recording of telephone conversations by one of the parties and requires that an automatic warning signal be provided. These regulations relate to the actual recording of content and do not address the tracing question. We are not aware of any FCC regulation or order concerning tracing but, as suggested above, you may wish to inquire directly of the FCC.

In summary, we are aware of no legal barrier to the tracing of calls by, or on request of, the FAA. If telephone company officials have some specific question concerning the legality, however, we would be happy to consider any particular legal arguments raised.

Sincerely,

Thomas E. Kauper
Acting Assistant Attorney General
Office of Legal Counsel