

Department of Justice
Washington, D.C. 20530

27 JAN 1981

MEMORANDUM FOR ROGER YERCHUK
Associate White House Counsel

Re: Recording of Telephone Conversations

This responds to your telephone inquiry concerning the legality of recording certain international telephone conversations upon the consent of one party to the conversation. We understand that your inquiry involves the possible recording by the President of his telephone conversations with foreign heads of state.

The Supreme Court has held consistently that the United States Constitution is not offended by the recording by government agents of conversations with the consent of one of the conversants. See, e.g., United States v. Caceres, ____ U.S. ____, 99 S. Ct. 1465; United States v. White, 401 U.S. 745, 91 S. Ct. 1122 (plurality opinion); and Lopez v. United States, 373 U.S. 427, 83 S. Ct. 1381. Similarly, Title III of the Organized Crime Control and Safe Streets Act does not prohibit the interception of wire or oral communications on the basis of one-party consent, so long as the interception is either conducted under color of law or for a purpose other than to commit a criminal tortious or injurious act. 18 U.S.C. § 2511(c) and (d). The District of Columbia Code imposes no additional restrictions on consensual recordings of the type contemplated. See 23 D.C. Code Ann. 542.

Although the Constitution and pertinent statutes do not prohibit recording telephone conversations with one-party consent, you should be aware of several regulatory restrictions pertaining to such activity. The General Services Administration (GSA) has promulgated regulations (copy attached) that prohibit consensual recording on FTS or certain other government telephones except in limited circumstances. These regulations permit consensual telephone recordings with certain procedural safeguards in the law enforcement, and public safety contexts. Foreign intelligence surveillance conducted pursuant to Executive Order 12036 is exempt from the GSA regulation. */

*/ Executive Order 12036 and the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, do not restrict monitoring that is conducted with the consent of one party to the conversation.

In addition, the GSA regulation permits recording with the express consent of all parties. The expiration date for the GSA regulation has been extended to July 31, 1981.

The Tariffs of the American Telephone and Telegraph Company require that a distinctive recorder tone be utilized when recording equipment is connected with services of the telephone company. A copy of this tariff is attached. Violations of this tariff may result in a suspension of services. Although there is no express exemption in the tariff for general law enforcement or foreign intelligence monitoring, presumably such monitoring, conducted pursuant to the pertinent Acts of Congress, would be exempt from the telephone tariff.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

Attachments