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3d Session } { No. 1304

INVESTIGATING WIRE TAPPING

MARCH 12 (legislative day, MARCH 4), 1940.—Ordered to be printed

Mr. WHEELER, from the Committee on Interstate Commerce, submitted the following

REPORT

[To accompany S. Res. 224]

The Senate Committee on Interstate Commerce to whom was referred the resolution (S. Res. 224) having considered the same, report thereon with the recommendations that it pass with an amendment.

The resolution (S. Res. 224) proposes an investigation by the Senate Committee on Interstate Commerce of wire tapping and the use of dictographs and similar devices for listening to or recording conversations. While the resolution deals with the use of such methods against employees and officials of Federal, State, and local governments, it might appropriately be broadened to cover the use of such methods against any person, official or nonofficial. The proposed investigation is sufficiently broad to deal with wire tapping and use of dictographs by governmental or private persons, by governmental or private detective bureaus, a political party in power or a political party out of power, and whether employed for purposes of political or business advantage, in industrial espionage against a commercial competitor or against labor unions, or in the detection of crime.

The dangers to personal liberty that may result from unrestricted use of wire tapping and similar practices have long been a subject of political argument and judicial controversy.

Two major factors have served to bring this particular problem more and more to the forefront among the many questions relating to the preservation of liberty and democracy.

One factor is the extension of the functions and duties of government, not only in regard to criminal matters but also in regard to administrative matters and matters of legislative and executive investigation. The resolution is broad enough to cover cases of wire tapping and dictographing, when used by Government officials and employees, as well as when they are used against such persons. There have been alleged instances where questionable detective practices have been used by private interests, but the bulk of the cases which have received public and judicial attention involve detective practices used by officers of Government.

As early as 1886 the Supreme Court recognized the dangers of subtle and indirect invasions of personal security by the Government itself. In *Boyd* v. *United States* (116 U. S. 616), which Mr. Justice Brandeis later referred to as "a case that will be remembered as long as civil liberty lives in the United States," the Court wrote (p. 630):

> The principles laid down in this opinion (of Lord Camden in *Entick* v. *Carrington*, 19 Howell's State Trials 1030) affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case there before the court, with its adventitious circumstances, they apply to all invasions on the part of the Government and its employees of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but is is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

The Court recognized that the problem of personal security is directly related to the safeguards of the fourth and fifth amendments, prohibiting unlawful searches and seizures and compulsory self-incrimination.

The other major factor which has made the problem of wire tapping and dictographing a matter of growing concern is the development of ever-improving scientific devices which may be adapted for detective purposes.

Twelves years ago Mr. Justice Brandeis, in his dissenting opinion in the case of *Olmstead* v. *United States* (277 U. S. 438), reviewed the background of the fourth and fifth amendments and the developments since their adoption. He wrote (p. 473):

> Subtler and more far-reaching means of invading privacy [than force, violence, torture, breaking, and entry] have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
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> Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

In the same opinion, Mr. Justice Brandeis said (p. 475):

> Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance, and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

He concluded (p. 485):

> Decency, security, and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Mr. Justice Brandeis regarded wire tapping as an unlawful search and seizure that violates the fourth amendment. But he argued that, even if it is not so regarded, when wire tapping is prohibited by State law, as it was in the *Olmstead case*, evidence obtained as a result thereof should not be admitted in a Federal court trial.

Mr. Justice Holmes, who also wrote a dissenting opinion in the *Olmstead case*, said (p. 469):

> * * * I think, as Mr. Justice Brandeis says, that apart from the Constitution, the Government ought not to use evidence obtained and only obtainable by a criminal act. * * *

Referring to wire tapping as "dirty business," Mr. Justice Holmes' dissent expressed a view (p. 471), the reasoning of which has since found its place in the present majority view of the Supreme Court:

> * * * if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

In 1934 Congress enacted legislation to curb wire tapping. Section 605 of the Communications Act of 1934 provided:

> No person receiving or assisting in receiving, or 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, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority.
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> And no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Section 501 of the Communications Act penalizes willful violations by fine and imprisonment:

> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who

willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done or willfully or knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

Three years later this statute came before the Supreme Court in *Nardone* v. *United States* (302 U. S. 379)—decided in 1937—which may be referred to as the first *Nardone case*. The Court held, in an opinion by Mr. Justice Roberts, that section 605 of the Communications Act prohibits Federal officers, as well as others, from resort to wire tapping, and therefore testimony of conversations overheard by such methods is not admissible in a Federal criminal trial.

As the Court stated (p. 383):

> Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty.

Once more the Court recognized the close link between subtle or secret invasions of privacy and those prohibited by the fourth and fifth amendments. The Court's opinion stated (p. 383):

> The same considerations may well have moved the Congress to adopt section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the fourth and fifth amendments of the Constitution.

Mr. Justice Frankfurter has described the first Nardone decision as follows (*Nardone* v. *United States*, decided December 11, 1939):

> That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being.

Two years after the first *Nardone case* was decided the second *Nardone case* came before the Supreme Court. This time the Court went still further to protect personal liberty and the rights of privacy against wire tapping. In the second *Nardone case* an attempt had been made to introduce testimony which consisted, not of conversations overheard by means of wire tapping, but of evidence obtained as a result of clues discovered by such means. The Supreme Court put down its foot again. The Court's opinion, delivered by Mr. Justice Frankfurter, described such evidence as the "fruit of the poisonous tree" (*Nardone* v. *United States*, decided December 11, 1939).

Wire tapping, dictographing, and similar devices are especially dangerous at the present time, because of the recent resurgence of a spy system conducted by Government police. Persons who have committed no crime, but whose economic and political views and activities may be obnoxious to the present incumbents of law-enforcement offices, are being investigated and cataloged. If information gathered in such investigations is being obtained by wire tapping, dictographing, or other reprehensible methods, and if it is some day offered as evidence in a Federal criminal trial, the courts may have an opportunity to apply the principles of the *Boyd case* and of the *Nardone cases*. But on the other hand, the information may perhaps never be offered in such a case, because the victims of wire tapping and similar methods may perhaps never be charged with a crime. In this event, the information may be used in extra-legal controversies where the courts may have no opportunity to adjudicate the matter. Wire tapping and other unethical devices may lead to a variety of oppressions that

may never reach the ears of the courts. They may, for example, have the effect of increasing the power of law-enforcement agencies to oppress factory employees who are under investigation, not for any criminal action, but only by reason of their views and activities in regard to labor unions and other economic movements; this is no fanciful case—such investigations are a fact today. In short, unauthorized and unlawful police objectives may be aided by wire tapping and dictographing practices, the extent of which we are not in a position to estimate without a careful inquiry into all the facts.

That some agencies of law enforcement are not likely, in regard to the problem of wire-tapping and dictographing, to be guided by the fine sense of ethical decency which has been expounded by the Supreme Court and embodied in the Bill of Rights, is unfortunately clear from a long history of unauthorized and unlawful police activity. This sort of activity flourished from 1919 to 1924. It was condemned by a committee of distinguished practicing lawyers, law school deans, and professors (including Professor, now Mr. Justice Frankfurter) and by Charles Evans Hughes (now Chief Justice) in 1920. It was condemned by Attorney General (now Associate Justice) Stone in 1924.

Wire tapping and dictographing are not likely to be eschewed by law-enforcement agencies which have, within the last 6 months, not hesitated to violate the most fundamental civil rights. It is no secret that some police have searched private homes without warrants and seized private papers without warrants. Some police have held unconvicted persons incommunicado, refusing the request of an arrested person for permission to see a lawyer promptly, privately and before he is questioned by the authorities, refusing to tell him promptly the nature of the charge on which he is being arrested and detained.

Some police have used the process of interrogation to entrap suspected persons. Some have exercised unauthorized power to "grill" such persons. Some have abused the power of arrest in order to question the arrested person on matters entirely different from those contained in the charge on which the arrest was based. Some have used grand-jury subpenas to trap witnesses into star-chamber inquisitions by detectives operating in their own quarters, free from the restraints which would be required by due process in a grand-jury proceeding. Some police have inflamed public opinion against arrested persons, in advance of their trial and sometimes even in advance of their indictment, by statements against them as criminals and by publication of rogue's-gallery photographs of the accused bearing criminal identification numbers. Some police have abused arrested persons by unwarranted chaining and other degrading and "third degree" treatment. (For various examples and discussion, see *Chambers* v. *Florida*, decided by the United States Supreme Court on February 12, 1940; *Johnson* v. *Zerbst, Warden*, 305 U. S. 458, decided in 1937; Report No. 11 of National Commission on Law Observance and Enforcement, dated June 25, 1931, pp. 3–4, 19, 21, 31, 33, 36–37, 153–155, 161, 166, 167, and *passim;* report of the American Bar Association Committee on Lawless Enforcement of the Law, 1930; The Third Degree and Legal Interrogation of Suspects, by Edwin R. Keedy, University of Pennsylvania Law Review, June 1937, page 761; Note, 43 Harvard Law Review 616, 1930; Our Lawless Police, by E. J. Hopkins, 1931.)

The most recent Supreme Court case on this subject was that of *Chambers* v. *Florida*, decided February 12, 1940. The importance of the constitutional amendments as the cornerstone of civil rights and decent government processes was enunciated therein by Mr. Justice Black's opinion as follows:

> The due-process provision of the fourteenth amendment—just as that in the fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities, and those who differed, who would not conform and who resisted tyranny. * * *
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> The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds, over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. * * * And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

Attorney General (now Mr. Justice) Murphy recently stated:

> In enforcing some laws, we must not violate other laws. In upholding the Constitution, we must not infringe on the priceless heritage of civil liberty which the Constitution guarantees. To do that—to suppress or suspend the Bill of Rights—would be to destroy the very democratic principles that we are seeking to preserve. It would be to yield to the same autocratic psychology that we want to keep out of this country. We must not let that come to pass. We must have it understood that while we will oppose firmly and vigorously any illegal activities, we will do so in a responsible manner and within the orbit of the Constitution. That is the American way.

Government officers are not the only persons who have been guilty of wire tapping. Private detective agencies, which feel that they fall outside the scope of the condemnation contained in the Supreme Court cases, are known to be active in industrial and even in political espionage. Alleged instances of wire tapping in connection with the latter type of activities are one of the most persuasive grounds urged upon this committee as a reason for conducting a thorough study of the situation.

If any Government police collaborate with private detective agencies engaged in wire-tapping practices, it is possible that some of them, knowingly or unknowingly, are using the "fruit of the poisonous tree."

It is important that the inquiry proposed by Senate Resolution 224 be thorough in regard to the use of dictographs and similar devices, as well as the use of wire tapping. Some law-enforcement agencies feel that the Supreme Court decisions condemning wire tapping do not extend to the use of dictographs. Thus the current issue of a magazine states that—

> the wire-tapping decisions do not place any ban on the use of hidden microphones and dictaphone outfits which often produce valuable evidence, because these have nothing to do with telephone wires.

Some people have argued from time to time that wire tapping, dictographing, and similar devices should be permitted, else society will suffer and criminals prosper. This argument has even been

urged in defense of the "third degree." Dr. Sheldon Glueck, of the Harvard Law School, discusses it in his treatise called Crime and Justice (p. 75):

> In justifying the "third degree," as in arguing for the admission of evidence unlawfully obtained, it is frequently urged by police officials that without such methods the obtaining of the proof would in many cases be impossible. But there is evidence that such methods, aside from their brutality, tend to defeat their own purposes; they encourage inefficiency on the part of the police. * * *

This quotation is cited in a footnote to Mr. Justice Black's opinion in the recent *Chambers* v. *Florida case*. The footnote also states:

> Our national record for crime detection and criminal law enforcement compares poorly with that of Great Britain, where secret interrogation of an accused or suspect is not tolerated.

One of the Federal police agencies has recorded the view that there has been a steady increase in crime in this country during the last two decades; yet in 17 of those years wire tapping was available (the first *Nardone case* not having been handed down until 1937); in all 20 years the use of the dictograph and similar devices was deemed available, and both at the beginning and end of the period violations of civil rights by some Federal police agents were not uncommon.

Perhaps the most famous disquisition on the question whether practices such as wire tapping are a necessary expedient was contained in the dissenting opinion of Mr. Justice Holmes in the *Olmstead case*. He said (p. 470):

> * * * we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime, I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

Senate Resolution 224, which is recommended for passage, will provide a congressional inquiry useful to ascertain, in the words of Senator Norris to the Attorney General on the subject of current demands for a more sweeping inquiry into other phases of "dirty business" by Government police, "whether the legitimate rights and liberties of any of our people have been frustrated and denied," and will be useful to prevent activities whether by public or private spy systems which "are going to bring into disrepute the methods of our entire system of jurisprudence," and will help to insure that "the activities of its officials and officers [are] kept within the bounds of civilized government."

The importance of this investigation is great. Whether it be the use of wire-tapping or dictographs by those seeking to detect crime, or their use by those seeking to commit crime, the effect on our judicial and social systems is far-reaching. As is natural, hitherto the courts have had before them cases of the former type, but cases of the latter sort are bound to come before them, especially if adequate legislation is enacted to deal with this evil. The fundamental principles have already been enunciated by the courts, and legislation that may be proposed after an investigation conducted under the terms of this resolution should contribute largely to that end.

The resolution (S. 224) is herewith made a part of the report, as follows:

[Omit the part in black brackets and insert the part printed in italics]

RESOLUTION

Resolved, That the Committee on Interstate Commerce is authorized and directed to make a full and complete investigation of alleged instances of (1) interception, by means of wire tapping or otherwise, of wire communications to or from officials and employees of the Federal, State, and local Governments, and (2) installation of dictographs or similar devices for the purpose of listening to or recording conversations participated in by such officials and employees. The committee shall report to the Senate as soon as practicable the results of its investigation, together with its recommendation for the enactment of any remedial legislation it may deem necessary.

For the purposes of this resolution, the committee, or any duly authorized subcommittee thereof, is authorized to hold such hearings, to sit and act at such times and places during the sessions and recesses of the Senate in the Seventy-sixth and succeeding Congresses, to employ and to call upon the executive departments for clerical and other assistants, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to administer such oaths, to take such testimony, and to make such expenditures as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per hundred words. The expenses of the committee, which shall not exceed [$15,000,] *$25,000*, shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman.

The subcommittee of the Senate Committee on Interstate Commerce which considered Senate Resolution 224 in executive session felt that the sum proposed, $15,000, was inadequate. The subcommittee recommended that the words and figures "Fifteen thousand dollars ($15,000)" on page 2, line 13, be stricken, and the words and figures "Twenty-five thousand dollars ($25,000)" be inserted in lieu thereof. The full committee recommended that amendment.

The Senate Committee on Interstate Commerce recommend passage of Senate Resolution 224 with an amendment.

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