ACLU (Northern California) News ~~Legis~~ SURV Oct 76

Tunney amendments stop wiretapping bill

The Foreign Intelligence Surveillance Act (S. 3197), which would have provided congressional authority for wiretapping Americans without the government's having convinced a judge there was probable cause to believe they had committed crimes, was dropped from the U.S. Senate's calendar before the close of the session.

Vigorously opposed by the ACLU, the bill would have given legislative recognition to the President's purportedly inherent "constitutional power . . . to acquire foreign intelligence information." In the guise of reform — centering primarily on an exceedingly ineffectual warrant procedure to be required for intelligence eavesdropping — S. 3197 would have given Congress' blessing to the very abuses it is supposedly set upon correcting.

Instrumental in killing the bill was the leadership of California Senator John Tunney. The ACLU had urged members and non-members alike to express their opposition to the bill, and Tunney reported that "the mail from individual citizens and from organizations was very heavy, all of it opposed to the bill and supporting my amendments."

The Act, which had broad liberal and conservative support and was personally backed by U.S. Attorney General Edward Levi, had passed the Senate Judiciary Committee on June 15 by a vote of 11-1, Tunney dissenting.

At hearings before the Select Committee on Intelligence, Senator Edward Kennedy (Mass.), Senator Charles Mathias (Md.) and Levi testified in support of the bill while Tunney, Senator Walter Mondale (Minn.), Representative Robert Drinan (Mass.) and the ACLU testified against it. But on August 10, the committee voted the bill out 8-1, with only small improvements and with Senator Robert Morgan (N.C.) dissenting.

Tunney, however, secured co-sponsorship to a total of 20 amendments that not only slowed the bill's progress but helped increase the controversy surrounding it and draw attention to its more dangerous provisions. Among those co-sponsoring one or more amendments were senators Frank Church (Idaho), George McGovern (S. Dak.), Alan Cranston (Calif.) and Morgan.

According to Bob McNair, Tunney's director of research, the chances of the measure being revived in the next session of Congress are "problematical," depending on the outcome of the presidential election among other things.

"If President Ford is still in office," said McNair, "there will probably be an attempt to made to push it through early in the year." Whether or not there would be changes in the bill is uncertain.

Also dying in the last session were two companion bills being considered by the Subcommittee on Courts, Civil Liberties and Administration of Justice of the House Judiciary Committee. The only Northern California member of the House Judiciary Committee is Don Edwards of San Jose, According to a staff assistant, Rep. Edwards would have voted against both bills had they come to a vote.

Tunney's opposition to S. 3197 came in the face of strong pressure from colleagues such as Kennedy. When the ACLU's national newsletter went to print in September, it reported that only a "miracle" by Tunney could prevent passage of the bill.

Sponsors of the bill had hailed it as a step forward in controlling national security wiretapping because it required, in most cases, that a judicial warrant be obtained before the start of any electronic surveillance. The Supreme Court has not yet held that the Constitution requires a warrant in cases where a foreign agent is involved, but the judicial review provided for in the bill would merely have been a rubber stamp to an executive branch decision.

S. 3197 would have prohibited the court from forcing the government agent to demonstrate that the target of the surveillance was truly a threat to national security and that the tap would actually produce evidence of the target's clandestine activities.

In addition, the court would have been required to issue a warrant if it found probable cause that the target was a "foreign agent." As amended by the Intelligence Committee, the term "foreign agent" included all non-Americans who are officers or employees of a foreign power, meaning ambassadors from foreign countries and their entire staffs, as well as employees of corporations like the government-controlled British Airways.

"Foreign agent" would have included Americans who, at the direction of a foreign power, engage in sabotage, terrorist or spying activities in violation of the criminal law. "Foreign agent" would have included Americans who, at the direction of a foreign power, covertly transfer information which a reasonable person would believe harmful to the security of the U.S.

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/s/ David M. Fishlow

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