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28 Jun 77

95TH CONGRESS
1ST SESSION

H. R. 843

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. DRINAN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend certain sections (authorizing wiretapping and electronic surveillance) of title 18 of the United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds and declares that—

(1) Widespread wiretapping and electronic surveillance, both by private persons and Government agents, both under color of law, and without pretense of legal excuse or justification, has seriously undermined personal security and often violated fundamental constitutional rights, including the rights to free speech, press, and association, the rights to due process and equal protection, and the right to privacy.

(2) Complexities and defects in current Federal law

have aided those who engage in wiretapping and electronic surveillance, and current Federal law has not provided adequate safeguards against corrupt abuses of communications technology.

(3) No person, in any branch of the Federal Government, in however high an office, or in any other governmental or private position should be authorized either explicitly or implicitly to violate the constitutional rights of persons by eavesdropping on private conversations through wiretapping and electronic surveillance.

(4) The end of prosecuting those who violate the law does not justify wrongdoing on the part of the Government.

(5) The peculiar susceptibility of wiretapping and electronic surveillance to misuse in the furtherance of partisan political goals renders wiretapping and electronic surveillance a particularly dangerous temptation to Government officials, and the chance of its misuse outweighs any potential benefits which might otherwise be found in it.

SEC. 2. Title 18 of the United States Code is amended—

(1) by striking out in section 2511 (1) "Except as otherwise specifically provided in this chapter any person who—" and inserting in lieu thereof "Whoever—";

(2) by inserting immediately after subparagraph (d) of section 2511 (1), but before "shall be fined" the following new subparagraph:

95TH CONGRESS
1ST SESSION

H. R. 843

A BILL

To amend certain sections (authorizing wiretapping and electronic surveillance) of title 18 of the United States Code.

By Mr. DRINAN

JANUARY 4, 1977

Referred to the Committee on the Judiciary

Approved For Release 2006/03/17 : CIA-RDP80S01268A000200010001-0

"(c) willfully intercepts or records any wire or oral communication without the consent of all the parties to such communication";

(3) by striking out "or" at the end of section 2511 (1) (c) and by inserting "or" at the end of section 2511 (1) (d);

(4) by striking out sections 2511 (2) (a) (ii), (b), (c), and (d);

(5) by striking out section 2511 (3);

(6) by striking out section 2512 (1) "Except as otherwise provided in this chapter, any person who willfully—" and inserting in lieu thereof "Whoever—";

(7) by striking out section 2512 (2); and

(8) by striking out sections 2516, 2517, 2518, 2519, 2510 (9).

p. 10

95TH CONGRESS
1st Session

SENATE

REPORT
No. 95-24

SEPARATION OF POWERS ANNUAL REPORT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

MADE BY ITS

SUBCOMMITTEE ON SEPARATION OF POWERS

PURSUANT TO

S. Res. 375, Section 16, 94th Congress, 2d Session
March 1, 1976, through February 28, 1977

FEBRUARY 22 (legislative day, FEBRUARY 21), 1977.—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
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LETTER OF TRANSMITTAL

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON SEPARATION OF POWERS,
Washington, D.C., February 22, 1977.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Subcommittee on Separation of Powers respectfully submits the following summary of its activities and investigations during the period March 1, 1976, through February 28, 1977, pursuant to Senate Resolution 375, section 16.

With all kind wishes, I am

Sincerely yours,

JAMES ABOUREZK,
Chairman, Subcommittee
on Separation of Powers.

95TH CONGRESS } SENATE { REPORT
1st Session } { No. 95–24

SEPARATION OF POWERS ANNUAL REPORT

FEBRUARY 22 (legislative day, FEBRUARY 21), 1977.—Ordered to be printed

Mr. ABOUREZK, from the Committee on the Judiciary, submitted the following

REPORT

[Pursuant to S. Res. 375, Section 16, 94th Congress, 2nd session]

The following report, covering the period March 1, 1976, to February 28, 1977, is submitted by the Subcommittee on Separation of Powers of the Committee on the Judiciary in compliance with section 16 of Senate Resolution 375 agreed to March 3, 1976.

The subcommittee's mandate, as set out in the resolution which created the subcommittee is:

> To make a full and complete study of the separation of powers between the executive, judicial, and legislative branches of Government provided by the Constitution, the manner in which power has been exercised by each branch and the extent, if any, to which any branch or branches of the Government may have encroached upon the powers, functions, and duties vested in any other branch by the Constitution of the United States.

BILLS AND RESOLUTIONS CONSIDERED

During the period covered by this report, the following bills and resolutions were considered by the subcommittee:

Bills pending in the subcommittee

S. 283, to limit the jurisdiction of the Supreme Court of the United States and of the district courts to enter any judgment, decree, or order, denying or restricting, as unconstitutional, voluntary prayer in any public school (By Mr. Helms, January 21, 1975).

S. 632, to help preserve the separation of powers and to further the constitutional prerogatives of Congress by providing for congressional review of executive agreements (By Mr. Bentsen, February 7, 1975).

S. 1251, to provide for improved Government organization with respect to executive agreements and to provide improved procedures for

forwarded any such agreements to Congress. As a result of the subcommittee's inquiry, Monroe Leigh, Legal Advisor to the State Department, undertook a review of intelligence cooperation agreements to determine if any of those arrangements were executive agreements within the meaning of the Case Act. Mr. Leigh testified that his office was pursuing approximately a "half dozen" documents which perhaps should have been submitted to Congress under the reporting law. And in addition to reviewing specific agreements, Mr. Leigh cited a need to coordinate an executive branch position on this matter. The ensuing 20-month exchange of correspondence and contacts between the subcommittee and the Legal Adviser's office resulted in the Congress receiving, for the first time, several formal arrangements with foreign nations on intelligence gathering. The subcommittee was assured that the Legal Adviser's office would "continue to examine documents on foreign intelligence arrangements, and will transmit to the two foreign relations committees any that are agreements within the meaning of the Case-Zablocki Act."

Reporting procedures

In 1975, the subcommittee requested the GAO to undertake an audit of the effect of the Case Act on the number and types of executive agreements being concluded and the extent of non-compliance with the reporting law. The GAO focused its inquiry on U.S. agreements with the Republic of Korea. The report concluded that "Congressional and State Department clarifications of the reporting requirements and improved controls over the reporting of agreements are needed."

In response to the GAO report, as well as to the various legislative proposals before Congress calling for congressional authority to disapprove executive agreements, the Legal Advisor issued supplemental guidelines respecting the administration and implementation of the Case Act to all key State Department personnel in Washington, to the general counsel of the several departments and agencies of the Government concerned with the issue, and to all U.S. diplomatic posts. The Legal Adviser's memorandum set forth the criteria applied by his office when determining whether any arrangement or document or series of arrangements of documents, constitute one or more international agreements under the Case Act. Also stressed was the necessity of transmitting concluded agreements to the Assistant Legal Adviser for Treaty Affairs in the State Department quickly so that the Department could meet the 60-day requirement of the law.

Legislative proposals

The subcommittee pursued several bills pending before it which seek to define the proper roles of the executive and the Congress in the conduct of foreign affairs. Those proposals generally require the submission of all executive agreements and some form of approval mechanism. Either affirmative approval would be required for each executive agreement falling within the scope of the definitions in the bills, or an executive agreement would come into force and be made effective after a time certain unless a concurrent resolution of disapproval was passed.

On July 1, 1976, Senator Clark introduced S. Res. 486, the Treaty Powers Resolution, which took a different approach to the executive

> In order to meet these obligations Congress must be able to call upon the executive branch and the independent agencies, the progeny of the Congress, for information that will enlighten the Congress about both the problem areas where legislation is needed and the effectiveness of existing legislative programs. If there is a continued refusal to respond to requests for information, the legislative process will be crippled.

The ranking minority member, Senator Mathias, also commented on the increasing frequency of confrontations between the executive and legislative branches:

> Although this tension between the branches has been building ever since Congress undertook its first investigation during George Washington's administration, a new dimension has been added to the controversy. In order to tighten its grip on Government information, the administration is attempting to impose sanctions for disclosing certain Government information.
>
> These proposals are contained in S. 1; in the President's recently issued Executive order on U.S. foreign intelligence activities; in the administration's proposal to amend the National Security Act of 1947; and in the resolution creating the Senate Intelligence Oversight Committee.
>
> Implicit in all these proposals is the notion that the executive branch will control both the scope and direction of all future congressional inquiries if it can effectively control the release of Government information.

Witnesses at the hearings testifying on the need for less secrecy in Government included Congressman John E. Moss, Carl Marcy, representing the Council for a Livable World, Marcus Raskin of the Institute for Policy Studies, and John H. F. Shattuck on behalf of the American Civil Liberties Union. Mr. Shattuck best expressed the sentiment of the witnesses in his statement:

> Congress dissipates its power when it permits the executive—as it appears to be doing now—to condition the disclosure of information on the willingness of Congress to accept *executive* restrictions on information. This is not to say that Congress cannot establish some restrictions of its own, but these must be consistent with the Speech and Debate Clause, and Expulsion Clause, as well as the informing function of Congress, which implements and reinforces the public's right to know.

Representing the executive branch was Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Department of Justice. Acknowledging that there was no "question [about] the propriety of Congress receiving [sensitive] information," Mr. Scalia nevertheless suggested that Congress "facilitate" cooperation in this field by restricting its demands for information. He outlined two "possible improvements": reduce to what Congress considers the necessary minimum the volume of sensitive material which is sought, and the number of different committees which receive it, and insure the protection of

CONGRESSIONAL OVERSIGHT AND INTELLIGENCE INFORMATION

A series of abuses in the Nation's intelligence agencies were uncovered during the 94th Congress by the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, chaired by Senator Frank Church. The Church committee concluded that the Government's domestic intelligence policies and practices require fundamental reform: Statutory guidelines are necessary to insure that these agencies carry out their mission in accord with constitutional processes; and congressional oversight, which has proven inadequate in the past, should be revitalized and made effective. A necessary step in this direction was made by the establishment of a permanent Senate Committee on Intelligence Activities.

Created under S. Res. 400, the Intelligence Committee was designed to reestablish a system of checks and balances to assure accountability within the intelligence agencies. However, as noted by the subcommittee's chairman, Senator Abourezk, two dangerous precedents were embodied in a seemingly innocuous provision of the resolution detailing procedures for handling sensitive information. The executive branch classification system was, for the first time, formally applied to Congress. The classification system, established without consultation or approval of Congress through a series of Executive orders, has universally been criticized as abused and overused. By applying the system to the Intelligence Committee, the Senate, in effect, ratified the system without addressing the need for reform. Senate Resolution 400 states that no member of the Intelligence Committee can disclose in whole or in part any classified information obtained from the executive branch. So while the Constitution establishes the dissemination of information as an important part of the legislative function (Art. 1, § 5; Art. 1, § 6), authority to disseminate information is denied the members of the Intelligence Committee.

Secondly, the adoption of the formal procedures for Presidential veto of committee actions injects the President into the day-by-day operations of the committee. Under the procedure, the President must be notified of each committee decision to disclose any classified information. Even a unanimous committee would be powerless to disclose the information in the face of a Presidential objection. The information could then be released only if the committee sought and obtained instructions from the full Senate.

As chairman of the Separation of Powers Subcommittee, Senator Abourezk objected to the procedure as it permitted the executive branch "to assert unacceptable limitations on the committee's operations, and created an unprecedented involvement by the executive in the operations of the Senate."

The chairman offered an amendment to the procedure which while providing for consideration of executive branch objections, would have retained Senate procedures for handling sensitive information. The formal involvement of the President would have been removed from the process. The amendment was labeled "very controversial," and attacked by opponents as having no "place in this compromise (S. Res. 400) which a lot of us worked awfully hard to achieve and to bring about the greatest degree of unanimity therein." Evidently, executive branch support for the creation of the Intelligence Committee

the subject of hearings before the subcommittee on December 12, 1975, and February 19, 1976.

These hearings were entitled "Representation of Congress and Congressional Interests in Court" and they examined the Justice Department's understanding of its obligation to represent Members of Congress and to defend the constitutionality of acts of Congress in court.

On the first day of hearings, Mr. Rex Lee, Assistant Attorney General for the Civil Division of the Justice Department, testified regarding the Department's policy and practice of representing Members, officers, and committees of Congress in litigation arising from their performance of official duties and of defending in litigation the constitutionality of acts of Congress. Witnesses at the second day of hearings testified regarding ethical questions which arise when the Department represents Congress and the obligations of the Department to defend the constitutionality of acts of Congress.

The executive branch has been serving as defense counsel for Members, officers, and committees in court since at least 1818. The subcommittee determined that the only statutory basis for this practice is 2 U.S.C. 118, enacted in 1875, which directs the Justice Department to represent officers of Congress upon request. The Department has represented Members, officers, and committees in at least 55 cases in the last 5 years alone. The subcommittee documented the dependence of Congress upon the Department to represent Congress in court. However, due to conflicts of interest, the Department increasingly finds itself unable to defend Congress.

The subcommittee disclosed information on a number of important congressional cases including *Doe* v. *McMillan* and *Eastland* v. *United States Servicemen's Fund* where the Department withdrew as defense counsel when the cases reached the Supreme Court. Chairman Abourezk expressed the concern of the subcommittee that "a conflict of interest of the type the Department recognized in the *McMillan* and *Servicemen's Fund* cases may arise whenever the Department is called upon to defend congressional powers where Congress may be relying on these same powers in disputes with the executive branch." The possibility for such conflicts has increased with Congress now asserting the right to bring its own court actions against the executive branch to secure compliance with subpenas and to enjoin illegal impoundments.

Prior to the hearings, on December 2, 1975, Chairman Abourezk introduced S. 2731, a bill to establish an Office of Congressional Legal Counsel to enable Congress to represent itself in litigation. On the basis of the Department's testimony, the bill was revised and on March 31, 1976, was reintroduced. It was then incorporated nearly verbatim as title II of the Watergate Reform Act, S. 495.

On May 12, 1976, S. 495 was reported unanimously by the Committee on Government Operations. S. Rept. 94–823. The subcommittee staff worked closely with the staff of the Government Operations Committee on title II of S. 495 and drafted those parts of their report which explained title II.

When S. 495 was reported, Chairman Abourezk arranged for it to be rereferred to the Judiciary Committee where a hearing was held on May 26, 1976.

foreign intelligence information by means of an electronic, mechanical or other surveillance device," if either of the following circumstances occurs: (1) the acquisition of information is accomplished by a method not contained in the definition "electronic surveillance," or (2) the facts and circumstances giving rise to the acquisition are so unprecedented and so potentially harmful to the United States that they cannot be reasonably said to have been within the contemplation of Congress in enacting this bill. The report on S. 3197 takes the position that the existence of "inherent" power is a question to be decided by the Supreme Court, and not the Congress. The report states that, if the executive is found by the court to possess independent power to engage in warrantless electronic surveillance for foreign intelligence purposes, the above-mentioned two exceptions are the only circumstances under which such power could be exercised.

The Subcommittee on Separation of Powers, under the chairmanship of Senator Abourezk, and his predecessor, Senator Ervin, has consistently held that the Congress should not recognize such "inherent" power. Thus the constitutionality of warrantless wiretapping must be measured against the requirements of the fourth amendment. The proper test is whether warrantless electronic surveillance for foreign intelligence is a "reasonable search" under the fourth amendment. The reasonableness of the procedure must be determined by balancing the fourth and first amendment interests sought to be protected by the requirement of a warrant in all cases, against a Presidential need to obtain national security intelligence in an immediate and unimpeded fashion. Stated differently, would a judicial warrant requirement unduly frustrate the gathering of foreign intelligence information through electronic surveillance?

Case law does not support that the President possesses power in the field of foreign affairs unlimited by the fourth amendment. Numerous Supreme Court decisions, particularly the *Curtiss-Wright* [1] and *Waterman* [2] cases, have spoken in broad terms of Presidential authority in the area of foreign affairs implied from article 2 powers. Neither case, however, declares that explicit provisions of the Bill of Rights can be subordinated to Presidential powers only implied from other sections of the Constitution. Moreover, the Supreme Court has rejected the Government's arguments for Presidential authority to order warrantless domestic wiretaps, stating that:

> Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech.[3]

The same framework applies to surveillance for foreign intelligence purposes as well. Just as a warrant requirement was found in *Keith* not to unduly frustrate the gathering of domestic intelligence, there is no compelling reason why judicial safeguards should be done away with in the foreign intelligence area. Should exigent circumstances demand immediate action, S. 3197 contained an emergency provision for initiating warrantless surveillance, subject to subsequent judicial review.

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[1] *United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304 (1936.)
[2] *Chicago and Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).
[3] *United States* v. *United States District Court*, 407 U.S. 297, 320 (1972) (the *"Keith"* case).

Committee Print—"List of Publications of the Subcommittee on Separation of Powers," through the 94th Congress, 1967–1976. (1976) 6 pages.

PUBLICATIONS FROM PAST SESSIONS OF CONGRESS STILL AVAILABLE FROM THE SUBCOMMITTEE

Ninetieth Congress (1967–1968)

Hearings

1. *Separation of Powers.*—A study of the separation of powers between the executive, judicial, and legislative branches of Government provided by the Constitution (the manner in which power has been exercised by each branch and the extent, if any, to which any branch or branches of the Government may have encroached upon the powers, functions, and duties vested in any other branch by the Constitution of the United States, July 19 and 20; August 2; and September 13 and 15, 1967. 282 pages. L.C. card 68–60324.

2. *Federal Constitutional Convention.*—On S. 2307, a bill to provide procedures for calling a constitutional convention for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to Article V of the Constitution. October 30 and 31, 1967, 242 pages. L.C. card 68–61199.

3. *Congressional Oversight of Administrative Agencies (National Labor Relations Board).*—Parts I and II—An examination of the role played by the National Labor Relations Board in the administration of the labor statutes. March 26 and 27; April 1, 8, 25, 26, 29, and 30; May 10; and June 5, 1968. 1694 pages. L.C. card 75–60513.

4. *The Supreme Court.*—A study of the Supreme Court and the position it occupies in our constitutional system. June 11, 12, 13, and 14, 1968. 662 pages. L.C. card 68–67409.

Ninety-First Congress (1969–1970)

Hearings

1. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges.*—On S. 1097, a bill to enforce the principle of separation of powers by amending title 28, United States Code, to prohibit the exercise or discharge by justices and judges of the United States of nonjudicial governmental powers and duties; and on S. 2109, a bill to provide for financial disclosure by members of the Federal Judiciary, July 14, 15, and 16; and September 30, 1969, 839 pages. L.C. card 75–610498.

2. *The Philadelphia Plan.*—On the so-called Philadelphia Plan, a plan devised by the Department of Labor and aimed at increasing minority employment in the construction trades in the Philadelphia area of Pennsylvania and New Jersey; and on S. 931, a bill to restore an appropriate separation of powers within the Federal Government in the area of equal employment opportunities and to preclude encroachment upon the legislative powers and functions of the Congress in this area. October 27 and 28, 1969. 326 pages. L.C. card 76–606422.

3. *The Independence of Federal Judges.*—A study of the impact of various legislative proposals, and actions by the Judicial Conference

mation.—On S. 858, S. Con. Res. 30, S.J. Res. 72, 1106, S. 1142, S. 1520, S. 1923, and S. 2073. Joint hearings before the Subcommittees on Separation of Powers on the Judiciary, and the Subcommittee on Separation of Powers and Administrative Practice and Procedure of the Committee on the Judiciary, and the Subcommittee on Intergovernmental Relations of the Committee on Governmental Operations April 10, 11, and 12; May 8, 9, 10, and 16; and June 7, 8, 11, and 26, 1973. [For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price: Volume 1, 537 pages, $3.75, Stock Number 5270–01997; Volume 2, 325 pages, $2.30, Stock Number 5270–02035; Volume 3, 620 pages, $4, Stock Number 5270–02165.] L.C. card 73–602897.

3. *Federal Constitutional Convention Procedures.*—On S. 1272, a bill to provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States pursuant to Article V of the Constitution. April 12, 1973. 22 pages. L.C. card 73–602776.

4. *Congressional Oversight of Administrative Agencies (The Cost of Living Council).*—October 9 and 10, 1973. Volume I, testimony, 536 pages. Volume 2, Appendix, "Internal Revenue Service, Economic Stabilization Program, Phase IV Handbook," and "Health Care Exceptions Manual, Preliminary Draft." 345 pages. [For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price: Volume I, $3.80; Volume 2, $2.30.]

5. *Removing Politics from the Administration of Justice.*—On S. 2803, a bill to insure the separation of constitutional powers by establishing the Department of Justice as an independent establishment of the United States, and S. 2978, a bill to establish a special commission to study the establishment of an independent permanent mechanism for the investigation and prosecution of official misconduct and other offenses committed by high Government officials. March 26, 27, 28, and April 2, 1974. L.C. card 74–602403.

Reports

1. *Congressional Oversight of Executive Agreements.*—Report on S. 3830, November 18, 1974 (Report No. 93–1286). 14 pages.

2. *Annual Report.*—Pursuant to Section 17, Senate Resolution 56, 93d Congress, 1st Session. Senate Report No. 93–1195, September 30, 1974, 283 pages.

Committee prints

1. *Comptroller General's Opinion of the Legality of Executive Impoundment of Appropriated Funds.*—Prepared for the Subcommittee on Separation of Powers, July 26, 1973, 43 pages. [For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Price 55 cents.]

2. *Separation of Powers and the National Labor Relations Board: Selected Readings.*—Prepared for the Subcommittee by Dr. James R. Wason, University of Maryland, and the Congressional Research Service of the Library of Congress in cooperation with the staff of the Subcommittee on Separation of Powers. Senate Document No. 92–94. 1973. 2510 pages. [For sale by the Superintendent of Documents, U.S.