

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's Briefing for the Emergency Debate on the Wilson Doctrine

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

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The Wilson Doctrine

1. On the 17th November 1966 the then Prime Minister, Mr Harold Wilson, said in a statement in the House of Commons:

“As Mr Macmillan once said, there can only be complete security with a police state, and perhaps not even then, and there is always a difficult balance between the requirements of democracy in a free society and the requirements of security. With my right hon. Friends, I reviewed the practice when we came to office and decided – on balance – and the arguments were very fine – that the balance should be tipped the other way and that I should give this instruction that there was to be no tapping of telephones of Members of Parliament. That was our decision and that is our policy. But if there was any development of a kind which required a change in the general policy, I would, at such moment as seemed compatible with the security of the country, on my own initiative make a statement in the House about it. I am aware of all the considerations which I had to take into account and I felt that it was right to lay down the policy of no tapping of telephones of Members of Parliament.”¹

2. This statement is known as the Wilson Doctrine. It was extended to the House of Lords by the Earl of Longford on as Lord Privy Seal on 22 November 1966.² It has been repeated and extended by successive Prime Ministers: including being repeated by Prime Minister Thatcher in 1980³ and by Prime Minister Blair in 1997 who clarified that the policy *“applies to in relation to telephone interception and to the use of electronic surveillance by any of the three Security & Intelligence Agencies.”⁴*
3. Mr Wilson’s statement is straightforward and unequivocal. He says on two occasions that it is his decision and policy that there will be ‘no’ tapping of telephones. He says that if there was a development which required a change to the policy he would make a statement to the House about it.
4. In 2006 the then Interception of Communications Commissioner, Sir Swinton Thomas, argued against the absolute nature of the Doctrine on the grounds that *“The Doctrine means that MPs and Peers can engage in serious crime or terrorism without running the risk of being investigated in the same way as any other member of the public.”⁵* He also disclosed that *“In the course of many meetings I have had with Ministers and Members of Parliament, it has become clear that many are determined that that state of affairs should continue.”* Prime Minister Blair unequivocally rejected this recommendation, telling the House of Commons that *“I have considered Sir Swinton’s advice very seriously...I have decided that the Wilson Doctrine should be maintained”⁶*.

Caroline Lucas & Ors v Secretary of State & Ors

5. On 14 October 2015 the Investigatory Powers Tribunal (IPT) ruled on a preliminary matter in Caroline Lucas MP & Ors v Secretary of State & Ors

¹ HC Deb 17 November 1966 Vol 736, columns 634-641.

² HL Deb Vol 278, Cols 122-3.

³ HC Deb 06 February 1980 Vol 978, Cols 244-5.

⁴ HC Deb 4 December 1997 Vol 302, Col 321.

⁵ In his Report for 2005-6.

⁶ HC Deb 30 March 2006 Vol 444, Cols 95-6.

concerning the effect of the Wilson Doctrine.⁷ The case is brought by one MP, one Peeress and one former MP against the Home and Foreign Secretaries and the three Secret Intelligence Agencies.

6. In its ruling the Tribunal essentially held (1) that the Wilson Doctrine has no legal effect (2) that it has never been, nor was ever intended to be absolute, (3) that whatever the scope of the remaining Wilson Doctrine it does not apply to interception warrants authorised under section 8(4) of the *Regulation of Investigatory Powers Act 2000* (RIPA) at the stage of issue and (4) that whatever the scope of the remaining Wilson Doctrine it applies to targeted but not incidental interception of Parliamentarians' communications.

Liberty's view

7. Liberty disagrees with the Tribunal's findings in this case. Liberty believes that the Wilson Doctrine was intended to be absolute and that any change in its scope should have been notified to Parliament, in terms, by the Prime Minister. We believe that the Executive has instead unilaterally rescinded the Doctrine without notifying Parliament and that this represents a significant, constitutional breach of trust between the Executive and sovereign Parliament to which it must answer. In our democratic system premised on parliamentary sovereignty and the Rule of Law, a breach of trust on this scale is a deeply worrying development.
8. Liberty also believes that the Wilson Doctrine has legal and binding force as it created a *legitimate expectation* in law on the part of Parliamentarians that their communications could not be intercepted. For a legitimate expectation to exist "*it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification.*"⁸ Mr Wilson's statement and its subsequent repetition by Prime Ministers up until 2007 have been clear and unambiguous. Despite this, the Tribunal, without reason, concluded that the statement was 'ambiguous' and with 'relevant qualification'.
9. The Tribunal seeks to justify its decision partly on the basis that the Agencies' bulk interception programmes make the prior filtering out of Parliamentarians' communications impracticable: "*The Doctrine cannot have been intended or understood to impose an obligation with which it was impossible in practice to comply*". This argument is misconceived as it ignores the fact that until the Intelligence & Security Committee reported on the practice in 2015, Parliament had not been formally notified of the Agencies' bulk interception practices. Liberty is currently challenging the system of mass interception of communications under s8(4) RIPA at the European Court of Human Rights.
10. The Tribunal also relies on the fact that Parliamentarians' communications are not referenced in RIPA. The Tribunal infers that the legislation therefore overrides the Wilson Doctrine. This reasoning is flawed. Surely the omission from RIPA and is evidence that Parliamentarians felt that their communications were not within scope of the legislation because they were given absolute protection under the Wilson Doctrine? The Interception of Communications Code of Practice, published in 2002, approved by Parliament and in force until earlier this year is

⁷ [2015 UKIPTrib 14_79-CH available at - http://www.ipt-uk.com/docs/Caroline_Lucas_JUDGMENT.pdf.

⁸ *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545.

similarly silent on the protection given to Parliamentarians' communications.⁹ Again this would seem to be further evidence that Parliamentarians considered their communications outside the scope of the Code. It is telling that the replacement "Draft Interception of Communications Code of Practice" published in February 2015 which *does* make reference to the potential for Parliamentarians' communications to be intercepted has not yet been put before or approved by Parliament.¹⁰

11. Liberty has long had concerns about the function and work of the IPT. It is not a Court as commonly understood, but a highly secretive Tribunal set up under RIPA. When the Tribunal hears cases, it is under no duty to hold oral hearings; or inter-partes hearings; and if it ultimately finds against a complainant – which it almost always does - it is prohibited from giving reasons for doing so, meaning that the individual does not know whether it's the case that no surveillance took place or whether surveillance took place which the Tribunal deems is lawful. There is no right of appeal from the IPT and it has no power to declare laws incompatible with human rights standards.

Breach of Trust by the Executive

12. As a result of the Government's submissions in this case and the policy contained in hitherto undisclosed Official Guidance on the Wilson Doctrine, it is now apparent that on or before July 2014, the Executive unilaterally decided to abandon the Wilson Doctrine without informing Parliament. In July 2014, over the course of the debate on the Data Retention and Investigatory Powers Bill, the Home Secretary, responding to a question about the Wilson Doctrine from Tom Watson MP, said:

"Obviously, the Wilson Doctrine applies to parliamentarians. It does not absolutely exclude the use of these powers against parliamentarians, but it sets out certain requirements for those powers to be used in relation to a parliamentarian. It is not the case that parliamentarians are excluded and nobody else in the country is, but there is a certain set of rules and protocols that have to be met if there is a requirement to use any of these powers against a parliamentarian".¹¹

13. This is the first time that the Wilson Doctrine had been described by a Government Minister in caveated terms.¹² But instead of explicitly notifying Parliament that the Doctrine was being redefined, the Home Secretary presented her comments on the Wilson Doctrine as a re-statement of the original Doctrine. There is clearly a huge gulf between the statements of Mr Wilson, Mrs Thatcher and Mr Blair on the one hand and Mrs May on the other. At the IPT hearing

⁹ Interception of Communications Code of Practice, available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97956/interception-comms-code-practice.pdf.

¹⁰ Interception of Communications Code of Practice , Draft for Public Consultation, February 2015, available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401866/Draft_1_interception_of_Communications_Code_of_Practice.pdf.

¹¹ HC Deb 15 July 2014 Vol 583, Col 713.

¹² Subsequently in the course of a debate in the House of Lords on the "Wilson Doctrine" Baroness Chisholm, responding to a question by Lord King of Bridgwater said "As he has said, it is not the case that parliamentarians are excluded, but certain rules and protocols have to be met if there is a requirement to use any of these powers against Parliamentarians". [HL Deb 22 July 2015 Vol 764, Cols 1107-9].

Mitting J summarized the Government's view on the Wilson Doctrine as being that it was a '*political statement in a political context, encompassing the ambiguity that is sometimes found in political statements*'.

14. The IPT judgment contains partial disclosure of the Official Guidance concerning the Wilson Doctrine and the Tribunal concluded it was satisfied that the Home Secretary was referring to this Guidance in her 2014 response to Tom Watson MP.
15. The Guidance redefines the Wilson Doctrine as protecting "*the communications of Parliamentarians in the performance of their parliamentary and constituency duties without fear that their communications are being targeted other than exceptionally where there is a compelling reason for doing so.*" It states that "*The Wilson Doctrine is important as it reflects the political sensitivity of the interception of communications of Parliamentarians. Such targeting should be regarded as exceptional*". It further claims that "*The Wilson Doctrine does not prohibit the interception (etc) of Parliamentarians' communications. There is no such prohibition in the relevant law (RIPA). Further it is not, and has never been, Government policy that Parliamentarians' communications may not be the subject of interception*". It goes on to reference the Home Secretary's 2014 statement during the DRIP Bill debate as evidence for this claim.
16. The Guidance states that the Wilson Doctrine would not apply to the communications of a Member of the European Parliament or Devolved Administrations and would not apply to incidental interceptions of Parliamentarians where acquiring intelligence on them is not the sole purpose of the surveillance activity. The Guidance also states that the Wilson Doctrine does not apply to bulk interception of communications under s8(4) RIPA. The Guidance clarifies that in these such situations, where the interception of Parliamentarians' communications does not engage the Wilson Doctrine, '*serious consideration*' would still be required before disseminating the consequent intercept product '*within MI5 or disclosed to an outside body*'. Official Guidance states that requests for a Parliamentarians' communications data do not fall within the scope of the Wilson Doctrine.
17. The Guidance sets out the authorization process for deliberating targeting a Parliamentarians' communications for interception. The normal political warrantry process should apply with "*particularly careful consideration*" given to whether the surveillance is necessary and proportionate. A number of Agency professionals must be informed and their advice invited which must be recorded on the Central Record. The DG must be consulted before the application is made to the Secretary of State and before deciding on a warrant. Before deciding whether to issue a warrant "*the Secretary of State will need to consult the Prime Minister via the Cabinet Secretary*".
18. The Guidance includes a range of further internal notifications that need to take place if reports concerning a Parliamentarians' intercepted communications are made and disseminated. Where Parliamentarians' have been targeted for interception, this "*will explicitly be brought to the attention of the Interception or Intelligence Services Commissioner (as appropriate) on their next inspection. Any material that is still being retained should be made available to him or her if requested, including detail of whether the material has been disclosed*".

Forthcoming Draft Investigatory Powers Bill

19. In a democratic country it is for Parliament, not the Executive or the security agencies themselves, to determine the extent of surveillance powers. This autumn, the Government is expected to publish a Draft Investigatory Powers Bill which will completely overhaul the current surveillance framework provided under RIPA and other laws, Codes and Guidance. Liberty urges Parliamentarians to take the opportunity provided by this legislation to require, in law, a set of bare minimum protections and safeguards for their communications and those of their constituents.
20. At the very least, as a matter of constitutional principle, there should be an extremely strong legislative presumption against interception and other forms of surveillance on Parliamentarians. This presumption could be rebutted, but only on the basis of a clear and specific suspicion that a particular Parliamentarian's communications contain evidence of serious criminality. This presumption should extend to other forms of surveillance against Parliamentarians – such as the retention and acquisition of communications data and the use of covert human intelligence sources. It should also be extended to cover the communications of Members of the Devolved Administrations.
21. Liberty also believes that all interception warrants should be signed off by the independent judiciary; mass suspicion-less interception should be ended; the rules governing intelligence sharing of surveillance data between the UK and foreign intelligence agencies should be set out in primary legislation and those who have been, but are no longer subjected to surveillance should be notified after the fact unless there is a specific and justifiable reason to withhold the information. These specific protections would in future help prevent the Executive and their Agencies from drifting so far from the spirit and intention of their governing legislation.

Conclusion

22. This is an historic moment in the relationship between Parliament and the Executive, between privacy and security and for public trust in democratic institutions and the rule of law. The "nothing to hide; nothing to fear" slogan of successive recent Governments has never sounded more hollow. Unregulated undercover policing operations have breached the trust and violated the freedoms of peaceful race equality and environmental campaigners. The confidential communications of journalists, human rights organisations and lawyers have been compromised by security agencies with apparent impunity for those responsible.
23. Mr Wilson's promise to Parliament was no mere party political puff. This is evidenced by its unequivocal nature and by his restatement and adoption of Mr Macmillan's earlier statement of values. This was a constitutional convention protecting vital discourse between the people and their ultimate representatives and in recognition of the doctrine that it is Parliament and not the Executive and its agencies that should be sovereign. That convention has first been obfuscated and now destroyed without the parliamentary consultation that Wilson's clear promise, legal principle and common courtesy required. If the rights and freedoms of Members of Parliament can be flouted in this way, what hope for the rest of us- the people they represent?

24. We call on Parliamentarians of all parties to seize the opportunities of this debate and forthcoming legislation. Executive arrogance cannot continue unchecked if rights, freedoms and parliamentary democracy are to endure.

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