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The Wilson Doctrine and Parliamentary Privilege

This submission concerns one particular aspect of parliamentary privilege which does not feature in the Green Paper but which does fall under the remit of the inquiry and relates in particular to the question of fair and equal treatment under the law and whether parliamentary privilege provides 'an inappropriate immunity for parliamentarians from criminal prosecution'.

The Wilson Doctrine

On 17 November 1966, in response to a series of questions in the House of Commons, the Prime Minister, Harold Wilson informed the House that 'there is no tapping of the telephones of honourable Members, nor has there been since this Government came into office.' The Prime Minister's assurance was the result of a review undertaken by the Wilson government shortly after taking office in 1964 and represented a change in existing policy. When pressed on the matter Wilson revealed that:

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 the 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 the telephones of Members of Parliament. (*Hansard – Commons*, 17 November 1966, cols.634-41).

Five days later, in response to a question in the House of Lords, the Lord Privy Seal added that this policy also applied to members of Upper House. (*Hansard – Lords*, 22 November 1966, col.122). In making these statements the Wilson government established a convention which has remained in force to the present day, and which has become known as the Wilson Doctrine. The Prime Minister set out the current government's commitment to maintaining the Wilson Doctrine in answer to a parliamentary question in January 2011 (*Hansard – Commons*, 24 January 2011, col.35W).

The Wilson Doctrine comprises two elements. The first is that the communications of members of parliament should not *generally* be subject to interception by the intelligence and security agencies. This does not, however, constitute a blanket ban on the interception of the communications of parliamentarians, and the second element of the doctrine, as Wilson made clear, is that if circumstances should arise in which the interception of a member's communications was considered necessary, then the Prime Minister would inform parliament that this general policy had been set aside. Crucially, however, the timing of this announcement is governed by considerations of national security and might, indeed is likely to be, some time later.

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Whilst successive governments have expressed their commitment to the practice as set out by Wilson, the continued application of this convention has been the subject of considerable confusion and some debate, and it is apparent that the Wilson Doctrine is little understood within Westminster or beyond. Parliamentarians and the media have tended to focus primarily on the first element of the doctrine, the general policy of non-interception of the communications of parliamentarians, whilst displaying little awareness of the second element which allows for this general policy to be set aside. Moreover, in recent years a number of factors have led some to question whether the continued application of the Wilson Doctrine is necessary or appropriate. Developments in communications technology, and more particularly changes to the mechanisms for oversight of the intelligence and security agencies, have prompted a series of questions, particularly within parliament, seeking clarification of the scope of the Wilson Doctrine. The principle which underpins the Wilson Doctrine, that parliamentarians should be treated differently to ordinary members of public, has also come under pressure in recent years, and is reflected in the Green Paper.

The Wilson Doctrine and Parliamentary Privilege

The relationship between the Wilson Doctrine and parliamentary privilege is not clear. In making his statement to the House, Wilson was in part responding to an inquiry into the state's right to intercept of communications carried out by a committee of Privy Counsellors, Chaired by Lord Birkett, which published its report in 1957. In the course of its inquiry the Birkett committee examined the question of the interception of MPs' letters and telephone calls and whether this would be a breach of parliamentary privilege. Although, the committee accepted that it was ultimately up to the House to decide, on the basis of the available evidence, which included a report of a committee of the House of Commons from 1844, unless MPs' communications were considered part of the proceedings of the House, to intercept them could not be considered a breach of privilege. The committee observed that 'it is difficult to imagine the circumstances in which a telephone conversation might be held to be related to a "proceeding of parliament"', but did suggest two possible occasions on which this might be the case. Firstly, if the communications related to an intended parliamentary question, or if the Secretary of State were induced to issue a warrant for the interception of a Member's telephone by something that a Member said in the House in relation to a Parliamentary proceeding. In all other cases, the committee concluded, the Secretary of State had the right to intercept Members' communications so long as the appropriate warrant was signed, something which, as the Birkett committee observed, had been recognised by the 1844 committee and 'so far as we know this recognition has never subsequently been rescinded or modified.' The Birkett committee concluded that:

So far as we can determine, a Member of Parliament is in exactly the same position as any private citizen in regard to the interception of his communications unless those communications were held to be connected with a proceeding in Parliament (*Report of the Committee of Privy Counsellors appointed to inquire into the interception of communications "The Birkett Committee"*, Cmnd. 283, London: Her Majesty's Stationery Office, 1957).

In accepting the recommendations of the Birkett Committee, the then Conservative government led by Harold Macmillan established that the interception of communications, including those of Members of Parliament, was a legitimate activity of the state, and so long as a warrant for

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interception was signed, should continue. Wilson's statement to the House in 1966 amounted to a reversal of that position with regard to the communications of parliamentarians. Successive governments have expressed their continued commitment to the practice as set out by Wilson. However, neither Wilson nor any of his successors have sought to explain the relationship between the Wilson Doctrine and parliamentary privilege and there is considerable scope for confusion amongst parliamentarians, the public, the media and those agencies responsible for carrying out interception as to what this might mean in practice. Moreover, it may be, indeed it seems likely, that the current understanding of the relationship between Members' communications and the proceedings of parliament would not be quite as limited as that offered by Lord Birkett. **There should be some clarification of the relationship between the Wilson Doctrine and parliamentary privilege. Insofar as the Wilson Doctrine is designed to provide protection for 'proceedings in Parliament' some clarification as to what this term means would also be helpful.**

The Wilson Doctrine and Members' Communications

The Wilson Doctrine is designed to provide a general protection for Members' communications. However, there is scope for confusion as to what this currently means. Wilson's statement referred only to the tapping of Members' telephones, but developments in communications technology since the 1960s have considerably expanded the means by which Members' may communicate and also the methods for intercepting communications. Clarification has been provided in recent years in answers to a series of parliamentary questions. In October 1997, shortly after taking office, Prime Minister, Tony Blair, confirmed that the government's policy on the interception of Members' telephones remained as set out by Wilson in 1966 (*Hansard – Commons*, 30 October 1997, col.861). The following month he clarified the scope of the policy by confirming that it also applied to electronic communications (*Hansard Commons*, 17 November 1997, col.18.). In 2002, in response to a further question about the scope of the Wilson Doctrine, the Prime Minister stated that 'the policy refers to all forms of warranted interception of communications' (*Hansard – Commons*, 21 January 2002, col.589W).

The Prime Minister's responses arguably represented an expansion on the commitment given by Wilson. This is not simply because Wilson's statement only referred to the tapping of MPs' telephones, but also because legislation has expanded the activities for which a warrant is required. When Wilson made his statement warrants were only issued for the interception of telephone calls and the mail. Other forms of surveillance, such as the use of bugging devices and the covert entry of private property either for the purpose of planting bugging devices or to search for intelligence, was unregulated. This remained the case until the passage of the Security Service Act in 1989. **Tony Blair's commitment therefore expanded the areas of surveillance covered by the Wilson Doctrine to include intrusive surveillance, such as the planting of bugs in MPs' offices or homes when this is carried out under warrant by the intelligence agencies. However, under the Regulation of Investigatory Powers Act other forms of surveillance, such as covert visual surveillance, eavesdropping in public places, and accessing communications data, such as records of e-mails sent and telephone calls made (although not the content of such communications), do not require a warrant signed by a Secretary of State, and do not therefore appear to be covered by the Wilson Doctrine, although they may fall under the definition of 'proceedings in Parliament.'**

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At the same time legislative changes also mean that the scope of the Wilson Doctrine is now in some respects more limited than when it was first outlined. When Wilson asserted in 1966 that there was to be no tapping of the telephones of Members of Parliament, such activities were largely the preserve of the intelligence agencies. In the years since then legislation has allowed for a significant growth in the use of intrusive surveillance by a range of public bodies, particularly the police. As a result, whilst the Wilson Doctrine continues to provide protection against the interception of parliamentarians' communications by the intelligence and security agencies, it does not provide a general prevention of their interception by other agencies. This was recently illustrated by the case of the Labour MP, Sadiq Khan, whose meetings with a constituent who was being held in prison were covertly recorded by the Metropolitan Police. The operation did not amount to a breach of the Wilson Doctrine because the interception was not carried out by the intelligence and security agencies under a warrant signed by a government Minister. However, one might argue that if the bugging of Sadiq Khan did not amount to a substantive breach of the Wilson Doctrine, it did at least undermine the spirit of it. **If the purpose of the Wilson Doctrine was to ensure that the communications of Members of Parliament are treated differently to those of ordinary members of the public, then the failure to keep pace with legislative changes and extend this to all agencies of the state now authorized to carry out intrusive surveillance may be seen to have effectively undermined it.**

Understanding of the Wilson Doctrine

The Green Paper suggests that parliamentary privilege is an often misunderstood concept, particularly beyond parliament. The Wilson Doctrine is also much misunderstood and particularly within parliament. There appears to be a widespread assumption, including amongst parliamentarians, that the Wilson Doctrine constitutes a blanket ban on the interception of Members' communications. The Surveillance Commissioner's report into the bugging of Sadiq Khan reveal that Mr. Khan assumed that his meetings with a constituent would be covered by the Wilson Doctrine and concluded that 'there is manifest scope for confusion in the minds of officers of public authorities and MPs as to the correct inter-relationship between the Wilson Doctrine and the legislation' (Chief Surveillance Commissioner, *Report on Two Visits by Sadiq Khan MP to Babar Ahmad at HM Prison Woodhill*, Cm.7336, February 2008, London: The Stationery Office). **Our own research, which included interviews with over one hundred parliamentarians from both Houses, indicates that, to the extent that they are aware of it at all, many Members appear to assume that their communications, including those with constituents, are covered by the Wilson Doctrine, and or, parliamentary privilege.**

The Surveillance Commissioner also raised questions about the extent to which public bodies responsible for carrying out interception are aware of the Wilson Doctrine, or can be expected to identify individuals as Members of Parliament. Although the bugging of Sadiq Khan did not amount to a breach of the Wilson Doctrine, it did serve to highlight some of the potential problems which might arise in its practical application, in particular whether individuals responsible for carrying out surveillance are aware of it and are able to recognise all of those parliamentarians to whom it applies. Moreover, whilst it seems unlikely that a Secretary of State would be unaware of the Wilson Doctrine when signing warrants to authorise interception, if a parliamentarian came into contact with an individual who was the subject of surveillance it is far from clear that this would be

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recognised, or whether it would lead to the termination of that part of the surveillance. Indeed, it is not clear whether this would amount to a breach of the Wilson Doctrine, or parliamentary privilege at all. **Whilst the intelligence and security agencies have a clear duty to operate in accordance with the law, questions might be asked about the extent to which those responsible for carrying out interception are, or indeed can be expected to be, aware of the status of a convention which is not part of the legislative framework and for which the parameters are set in the responses to a series of parliamentary questions.**

The Wilson Doctrine and Oversight of the Intelligence and Security Agencies

At the time of its introduction the Wilson Doctrine was viewed as a necessary safeguard to prevent the involvement of the intelligence and security agencies in the political process. In the years since Wilson made his statement a raft of legislation has sought to regulate the interception of communications and to put the intelligence and security agencies on a statutory footing. In 1985 the Interception of Communications Act provided a legal framework for the process of issuing warrants for telephone tapping and the opening of mail. It also established a review mechanism involving the creation of an Interception of Communications Commissioner to examine the process of issuing warrants, and a tribunal to investigate complaints about interception by public bodies. Four years later the Security Service Act placed MI5 on a statutory footing and established similar procedures for the issuing of warrants to interfere with property. In 1994 the Intelligence Services Act did the same for the intelligence agencies and provided a further level of oversight with the establishment of a committee of parliamentarians to oversee the administration, policy and expenditure of the intelligence and security agencies. Finally, in 2000 the Regulation of Investigatory Powers Act updated and superseded the 1985 legislation taking account of developments in communications technology such as the growth in electronic communications. It also provided a regulatory framework for authorising activities, such as eavesdropping and visual surveillance, not covered by the 1985 Act which had only referred to postal and telephone interception. It is regrettable that in this raft of legislation no attempt was made to entrench the Wilson Doctrine in law, and it remains a convention which is exercised at the Prime Minister's discretion.

In 2005, the Interception of Communications Commissioner carried out an investigation into the implications of the Regulation of Investigatory Powers Act for the continued operation of the Wilson Doctrine. The Commissioner made a strong case for revoking the Wilson Doctrine on both legal and moral grounds. Firstly, he observed, that whilst the Wilson Doctrine may have been defensible in 1966 'when there was no legislation governing interception and there was no independent oversight', the interception of communications was now 'strictly regulated', including the need for warrants to be signed by a Secretary of State, the limited grounds on which warrants would be granted, and the role of the Commissioner in ensuring that improper interceptions do not take place. The Commissioner also argued that changes in the prevention and detection of crime since 1966 meant that interception of communications was now 'the primary source of intelligence in relation to serious crime and terrorism'. Whilst he was not, he added, suggesting that Members of Parliament were engaging in such activities, 'to maintain that no MP or Peer ever has or ever will' was, he suggested, 'absurd.' Aside from such practicalities he concluded that there was no moral justification for maintaining the practice, observing that it was a fundamental feature of the British

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constitution that 'no-one is above the law or is seen to be above the law' (*Report of the Interception of Communications Commissioner for 2005-2006*, HC315, 19 February 2007, London: The Stationery Office, 2007).

However, the government should also be mindful that there has been considerable opposition to repeal of the Wilson Doctrine, particularly from within Parliament. Following a statement to parliament in 2005 in which Prime Minister Tony Blair stated that he was considering revoking the Wilson Doctrine (*Hansard – Commons*, Written Ministerial Statement, 15 December 2005, co.173WS) three Early Day Motions were tabled in the space of two days objecting to any attempt to abandon the Wilson Doctrine. The EDMs, two of which were tabled by Labour MPs and one by a Liberal Democrat, were signed by a total of 113 MPs, one in six Members of the House of Commons, and approximately one-quarter of backbench MPs. Opposition has also been expressed by the Intelligence and Security Committee, which looked at the Wilson Doctrine in 2001 and concluded that 'it is important that it is not eroded in any way' (ISC, *Annual Report 2001-2002*, London: The Stationery Office, 2002), and repeated its concerns when the issue arose again in 2005. The then Speaker of the House of Commons, Michael Martin, was also strongly opposed to the proposed changes. In evidence to the House of Commons Committee on Privilege in 2010, Lord Martin revealed that he had been pressed by the Interception of the Communications Commissioner to support repeal of the Wilson Doctrine, and had enlisted the support of the Deputy Prime Minister to persuade the Commissioner to back down (House of Commons Committee on Issue of Privilege, *Police Searches on the Parliamentary Estate*, first report, HC62, 15 March 2010, London: The Stationery Office, Ev19, Q137).

While we would argue that the current system of oversight is not without flaws, and indeed it is currently in the process of reform, we would agree with the Commissioner that these legislative arrangements provide the most effective and appropriate means for protecting Members' communications. We would also agree that the Wilson Doctrine is a constitutional anomaly which offends the principle of equality under the law. This was somewhat less problematic when the intelligence and security agencies themselves had no legal mandate, but its continued operation is out of step with more recent changes in the legislative framework within which the agencies now operate.

Conclusions

The Wilson Doctrine

- The Wilson Doctrine comprises two elements. The first is that the communications of members of parliament should not *generally* be subject to interception by the intelligence and security agencies. The second is that if circumstances should arise in which the interception of a member's communications was considered necessary then the Prime Minister would inform parliament that this general policy had been set aside.

The Wilson Doctrine and Parliamentary Privilege

- There should be some clarification of the relationship between the Wilson Doctrine and parliamentary privilege. Insofar as the Wilson Doctrine is designed to provide protection

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for 'proceedings in Parliament' some clarification as to what this term means would also be helpful.

The Wilson Doctrine and Members' Communications

- Prime Minister Tony Blair's statement that the Wilson Doctrine applied to all forms of warranted interception of communications expanded the scope of the Wilson Doctrine to include all forms intrusive surveillance when this is carried out under warrant by the intelligence agencies. However, under the Regulation of Investigatory Powers Act other forms of surveillance, such as covert visual surveillance, eavesdropping in public places, and accessing communications data, such as records of e-mails sent and telephone calls made (although not the content of such communications), do not require a warrant signed by a Secretary of State, and do not therefore appear to be covered by the Wilson Doctrine, although they may fall under the definition of 'proceedings in Parliament.'
- If the purpose of the Wilson Doctrine was to ensure that the communications of Members of Parliament are treated differently to those of ordinary members of the public, then the failure to keep pace with legislative changes and extend this to all agencies of the state now authorized to carry out intrusive surveillance may be seen to have effectively undermined it.

Understanding of the Wilson Doctrine

- There is considerable potential for misunderstanding the nature and scope of the Wilson Doctrine on the part of parliamentarians, the media, the public and those agencies responsible for the interception of communications.
- Our own research, which included interviews with over one hundred parliamentarians from both Houses, indicates that, to the extent that they are aware of it at all, many Members' appear to assume that their communications, including those with constituents, are covered by the Wilson Doctrine, and or, parliamentary privilege.
- Whilst the intelligence and security agencies have a clear duty to operate in accordance with the law, questions might be asked about the extent to which those responsible for carrying out interception are, or indeed can be expected to be, aware of the status of a convention which is not part of the legislative framework and for which the parameters are set in the responses to a series of parliamentary questions.

The Wilson Doctrine and Oversight of the Intelligence and Security Agencies

- At the time of its introduction the Wilson Doctrine was viewed as a necessary safeguard to prevent the involvement of the intelligence and security agencies in the political process. In the years since Wilson made his statement a raft of legislation has sought to regulate the interception of communications and to put the intelligence and security agencies on a statutory footing. These legislative arrangements provide the most effective and appropriate means for protecting Members' communications.

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- The Wilson Doctrine is a constitutional anomaly which offends the principle of equality under the law. This was somewhat less problematic when the intelligence and security agencies themselves had no legal mandate, but its continued operation is out of step with more recent changes in the legislative framework within which the agencies now operate.

The research on which this submission is based was carried out as part of a wider research project on Parliamentary scrutiny of the intelligence and security agencies, which was funded by the Leverhulme Trust. We have examined this issue in more detail in an article accepted for publication in the journal *Intelligence and National Security*. We would be happy to provide a copy of this.

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