Michigan Law Review

Volume 35 | Issue 8

1937

CONSTITUTIONAL LAW - UNREASONABLE SEARCH AND SEIZURE - UNAUTHORIZED EXAMINATION OF TELEGRAMS

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CONSTITUTIONAL LAW — UNREASONABLE SEARCH AND SEIZURE — UNAUTHORIZED EXAMINATION OF TELEGRAMS — A special committee of the United States Senate, appointed to investigate lobbying activities in connection with the so-called "holding company bill" sought to obtain from telegraph companies, under blanket subpoena duces tecum, all telegrams passing through their offices in Washington from February 1, 1935 to September 1, 1935. When the telegraph companies expressed reluctance to comply with the subpoenas, the Senate Committee sought aid from the Federal Communications Commission. The commission by formal resolution detailed a member of its staff to work with an examiner of the Senate Committee in the examination and copying of the telegrams.[1] Among the messages so examined and copied were messages sent by the appellant, and he sought to restrain acquisition and use of these messages. *Held*, that the bill was rightly dismissed in the district court for want of jurisdiction as to the Senate Committee; but that the action of the commission was in principle a trespass which a court of equity could have enjoined were it still in progress, but there being no present action by the commission or contemplated future action, such as the bill complained of, an injunction would not be decreed. *Hearst v. Black*, (D. C. App. 1936) 87 F. (2d) 68.

In the present case, appellant contended that the action by the commission and the committee violated rights guaranteed by the Fourth Amendment of the Constitution of the United States.[2] The Supreme Court of the United States in the *Olmstead* case [3] indicated an intent to confine the definition of the search and seizure clause to its historical limits; and this may explain the refusal of the Court in the present case to hold the acts complained of to be a specific violation of the Fourth Amendment.[4] The Fourth Amendment has long been associated with general warrants, writs of assistance, and the inviolability of the privacy of a man's dwelling house.[5] Here, however we have an orderly investi-

[1] The court as a preliminary matter held that the power of the commission as to inspection of the books of telegraph companies, granted in § 220 (c) [47 U. S. C., § 220 (c) (1934)] of the act creating the Federal Communications Commission, was not broad enough to give them power to make a dragnet inspection of all telegrams. See also Interstate Commerce Comm. v. Brimson, 154 U. S. 447 at 479, 14 S. Ct. 1125 (1894).

[2] The Fourth Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

[3] 277 U. S. 438, 48 S. Ct. 564, 66 A. L. R. 376 (1928).

[4] In this case, Chief Justice Taft, in distinguishing the applicability of the Fourth Amendment to sealed letters from its applicability to wire tapping of telephone messages, stated, "The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." 277 U. S. 438 at 464. There was a strongly supported dissent in this case.

[5] 1 COOLEY, CONSTITUTIONAL LIMITATIONS, Carrington ed., 610 (1927). See also Carroll v. United States, 267 U. S. 132 at 149, 45 S. Ct. 280 (1924).

gation by an administrative tribunal.[6] Nevertheless, such action has been repeatedly attacked on the ground that such investigation may violate the Fourth Amendment.[7] The historical scope of the doctrine of search and seizure has been enlarged so that a subpoena duces tecum, which is so broad as to indicate studied indefiniteness, has been held to be a violation of that provision.[8] To allow as broad an inquiry as here effected, would provide an easy means for circumvention of the spirit, if not the letter, of the Fourth Amendment and the necessity for protection has been recognized.[9] It is well recognized that a person has a right of property in letters which a court of equity will protect.[10] There would seem to be a like property in telegrams. Whether the acts here complained of were held to be in violation of the Fourth Amendment, or in principle a trespass, there would seem to be sufficient grounds on which the court could protect the right of privacy of the appellant.[11] But in the instant

[6] See Handler, "The Constitutionality of Investigations by the Federal Trade Commission, Part II," 28 COL. L. REV. 905 at 909 (1928).

[7] Interstate Commerce Comm. v. Brimson, 154 U. S. 447 at 479, 14 S. Ct. 1125 (1894); Interstate Commerce Comm. v. Baird, 194 U. S. 25 at 45, 24 S. Ct. 563 (1904); Harriman v. Interstate Commerce Comm., 211 U. S. 407, 29 S. Ct. 115 (1908); Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336, 32 A. L. R. 786 (1924).

[8] Hale v. Henckle, 201 U. S. 43 at 76, 26 S. Ct. 370 (1907); In re American Sugar Refining Co., (C. C. N. Y. 1910) 178 F. 109; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182 (1920). But see also Brown v. United States, 276 U. S. 134, 48 S. Ct. 288 (1928); Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 S. Ct. 178 (1907); United States v. American Tobacco Co., (C. C. N. Y. 1906) 146 F. 557.

[9] Justice Holmes regarded an attempt to accomplish a broad search of a private corporation's records "in the hope that something will turn up," as a "fishing expedition," inconsistent with the spirit of the Fourth Amendment. Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298 at 306, 44 S. Ct. 336, 32 A. L. R. 786 (1924). In the district court, in the same case, Manton, J., stated in answer to the Trade Commission's claim that the Tobacco Company should deliver to the Commission possession of accounts, books, records, documents, and correspondence for the purpose of examination and inspection, "To grant the relief prayed for by the petitioner would be to permit an unreasonable search and seizure of papers in violation of the Fourth Amendment." Federal Trade Comm. v. American Tobacco Co., (D. C. N. Y. 1922) 283 F. 999 at 1007. See also Hitchcock, "The Inviolability of Telegrams," 5 So. L. REV. (N. S.) 473 at 513 (1879), where he states the danger of allowing the use of telegrams even for a secret proceeding, "It is not wise to put too severe a strain upon the virtue even of statesmen, nor absolutely certain that every such committee will scrupulously guard the secrets, perhaps of personal or political rivals, not relevant to the inquiry at hand, which the sifting of six months' accumulated telegrams might reveal." See also Justice Brandeis' dissent in Olmstead v. United States, 277 U. S. 438 at 471-485.

[10] Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Rep. 670 (1818); Baker v. Libbie, 210 Mass. 599, 97 N. E. 109, 37 L. R. A. (N. S.) 944, Ann. Cas. 1912D 551 (1912); Ku Klux Klan v. International Magazine Co., (C. C. A. 2d, 1923) 294 F. 661.

[11] A very cogent argument for the applicability of the Fourth Amendment to telegrams is to be found in Hitchcock, "The Inviolability of Telegrams," 5 So. L. REV.

case it was shown that the commission was not engaged in or contemplating any further action for the committee. While an injunction will issue against officers acting outside the scope of their authority,[12] there must be a continuing trespass, or apprehension of danger before a court of equity will grant relief.[13] Therefore the court was not necessarily concerned with the question of the applicability of the Fourth Amendment to the situation, and there were adequate grounds for denial of the relief which the appellant sought.[14]

Peter S. Boter

(N. S.) 473 at 514 (1879), wherein the author states, "Every paper belonging to himself which any man desires to keep private, and communicates to no one except confidentially for his own private purposes, remains a private paper so far as either third parties or the law is concerned, *until some lawful reason and necessity arises for that paper to be made public.* The personal right of privacy in respect of one's papers is as truly invaded, and an enforced search into their contents is equally 'unreasonable' within the meaning of the Constitution, whether such papers be indiscriminately seized in the owner's house, or without some lawful reason therefor are indiscriminately seized from the confidential keeping of a telegraph company, by means of a subpoena *duces tecum*, and delivered to a court, or grand jury, or legislative committee, for inspection at will." But see United States v. Babcock, 3 Dill. 571, Fed. Cas. No. 14484 (1876); Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426 (1880); Woods v. Miller, 55 Iowa 168, 7 N. W. 484 (1880). See also 1 COOLEY, CONSTITUTIONAL LIMITATIONS, Carrington ed., 625, note 2 (1927).

[12] Ex Parte Young, 209 U. S. 123, 28 S. Ct. 441, 13 L. R. A. (N. S.) 932 (1908); State ex rel. West v. Huston, 27 Okla. 606, 113 P. 190, 34 L. R. A. (N. S.) 380 (1910); Adams v. Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797 (1900).

[13] Parkinson Co. v. Building Trades Council, 154 Cal. 581, 150 P. 1122 (1908); Hodgeman v. Olsen, 86 Wash. 615, 150 P. 1122, L. R. A. 1916A 739 (1915).

[14] The court determined that the case was rightly dismissed as to the committee in the district court on the grounds that the court lacked jurisdiction, because under the doctrine of separation of powers, it could not interfere with a coordinate branch of the government in the exercise of its powers. See Springer v. Philippine Islands, 277 U. S. 189 at 201, 48 S. Ct. 480 (1927); Alpers v. San Francisco, (C. C. Cal. 1887) 32 F. 503 at 506.