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Law of Wire Tapping

Margaret Lybolt Rosenzweig

THE LAW OF WIRE TAPPING*

MARGARET LYBOLT ROSENZWEIG

Introduction

The earliest references in the law to wire tapping are found in the penal provisions enacted by the state legislatures during the last half of the nineteenth century when the growing use of the telegraph gave rise to a new body of law for the protection of this mode of communication.[1] These provisions were usually in the form of a malicious injury statute forbidding the act of wire tapping among other interferences with the telegraph system or specified kinds of property damage to the telegraph company. Prosecutions under these provisions seem to have been rare. The law lay dormant, therefore, until the lawless twenties when the rise of organized crime, the difficulty of enforcing the Prohibition Law, and the perfecting of wire tapping devices brought about widespread use of wire tapping in crime detection by law enforcement officers.

The use of wire tapped evidence in criminal prosecution raised the serious question whether such evidence was admissible even though it had been obtained in violation of statute or through invasion of constitutional rights. If the evidence aided in the determination of the guilt or innocence of the accused, should the court ignore the manner in which it had been secured, or should the court reject it regardless of the end to be achieved, because of the reprehensible means used to obtain it? This is the basic question which has engaged the attention of the courts, of the legislatures, and of every writer in the field during the last quarter of a century.

This problem is an offshoot of an older controversy which has been waged with bitterness in American courts since the decision of the United States Supreme Court in *Weeks* v. *United States* in 1914.[2] This controversy concerns admissibility of evidence obtained in violation of the right guaranteed by the Fourth Amendment of the United States Constitution and by the constitutions of all the states[3] against unreasonable searches and seizures. Although wire tapping is not technically a "search" or a "seizure" within the meaning of the Fourth Amendment,[4] the law relating to evidence pro-

*This is the first instalment of a study which was prepared for the New York State Bar Association. The second instalment will appear in the September 1947 issue of the QUARTERLY.

[1]The statutes and decisions interpreting them are discussed in Part IV of this study.

[2]232 U. S. 383, 34 Sup. Ct. 341 (1914).

[3]See note 50 *infra*.

[4]Olmstead v. United States, 277 U. S. 438, 48 Sup. Ct. 564 (1928).

cured by wire tapping is in many respects analogous to that relating to search and seizure. An understanding of the principal cases involving wire tapping is impossible without a knowledge of the development and arguments relating to the older and more general controversy to which the law of wire tapping is heir. This study, therefore, after a reference to early English and American cases dealing with the admissibility of illegally obtained evidence, will proceed to a consideration of the *Weeks* case and succeeding cases in the United States Supreme Court which established the so-called federal rule as to the admissibility of evidence secured by unreasonable search and seizure. It will then show the position of the other jurisdictions on this question as some indication of their policy on admitting wire tapped evidence, since few state courts have ruled directly on admissibility of the latter. With this foundation, an examination will be made of the following points: the admissibility of wire tapped evidence in federal courts under the provisions of the Fourth Amendment and federal statutes; the penal provisions of the various states prohibiting wire tapping and the cases on admissibility of wire tapped evidence in those few jurisdictions where this has been determined; the law of New York State with particular reference to the significance of the 1938 amendment to the constitution and the wire tapping statute implementing this amendment; and lastly, an analysis of the considerations usually offered for and against admission of wire tapped evidence.

PART I

The State of the Law Generally as to the Admissibility of Illegally Obtained Evidence Prior to the Weeks *Case.*

The general rule that the illegal manner in which evidence was obtained is not a valid objection to its admissibility has its roots far back in the common law.[5] In the trial of Bishop Atterbury for treason in 1723, the question arose whether the interception of certain letters which the Crown offered in evidence had been made under warrant as required by statute. It was decided that the question how the letters were obtained would not be considered, that it was "inconsistent with the public safety, as well as unnecessary for the prisoner's defence, to suffer any further enquiry to be made".[6] This principle was carried over into civil cases for the first time in *Jordan* v. *Lewis*,[7] an action for malicious prosecution, in which the plaintiff

[5]This rule has been called one of the oldest of the common law. Note (1911) 136 Am. St. Rep. 135, 137.
[6]Bishop Atterbury's Trial, 16 How. St. Tr. 323, 495 (1723).
[7]14 East 306, 104 Eng. Rep. 618 n. (1740).

obtained a copy of the indictment against him without authority of the judge in the criminal action. It was held that the copy was admissible regardless of the illegality of the manner in which it was obtained. *Legatt* v. *Tollervey*[8] and *Caddy* v. *Barlow*[9] were also actions of malicious prosecution involving similar questions as to the admissibility of copies of indictments which were illegally obtained. Both courts followed the ruling in *Jordan* v. *Lewis* without question. *Stockfleth* v. *De Tastet*[10] was an action of assumpsit in which the court received evidence over defendant's objection of his examination in a bankruptcy suit contrived by plaintiff's solicitor, who was also solicitor to the commissioner in bankruptcy, for the sole purpose of securing evidence for this action. Lord Ellenborough stated that he could not consider whether the defendant was properly or improperly summoned before the commissioners in bankruptcy. In *Rex* v. *Derrington*[11] the defendant, indicted for burglary, objected to the admissibility of a letter written by him while in prison which the turnkey had promised to post and instead had turned over to the authorities. The objection was overruled.

Later English courts adhered consistently to the doctrine of admissibility,[12] but it is the handful of decisions cited in the preceding paragraph which form the cornerstone of the doctrine. They were in existence when the question was first considered by an American court, and two of them, *Legatt* v. *Tollervey* and *Jordan* v. *Lewis,* were cited by it as sound authority for the

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[8] 14 East 302, 104 Eng. Rep. 617 (1811).
[9] 1 Man. & Ry. 275 (1827).
[10] 4 Camp. 10, 171 Eng. Rep. 4 (1814).
[11] 2 Car. & P. 418, 172 Eng. Rep. 189 (1826).
[12] Queen v. Granatelli, VII Rep. St. Tr. (N.S.) 979 (1849) (prosecution illegally obtained knowledge of contents of incriminating document); Phelps v. Prew, 3 E. & B. 430, 118 Eng. Rep. 1203 (1854) (evidence obtained by breach of privilege between attorney and client); Calcraft v. Guest, [1898] 1 Q.B. 759 (breach of privilege between attorney and client); Lloyd v. Mostyn, 10 M. & W. 478, 152 Eng. Rep. 558 (1842) (same). See 86 JUST. P. 173 (1922) to the effect that evidence is admissible in English courts despite the illegal manner in which it may have been secured. Elias v. Pasmore, [1934] 2 K.B. 164 (1933), an action of trespass against police officers for unlawful seizure of papers, allowed no recovery where the papers seized had been admitted in evidence in a criminal prosecution against Elias, ". . . the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by anyone, and that so far as the documents in this case fall into this caegory, the seizure of them is excused. . . . the seizure of these exhibits was justified, because they were capable of being and were used as evidence in this trial. If I am right in the above view, the original seizure of these exhibits, though improper at the time, would therefore be excused," Id. at 173. Thus, according to this reasoning, the evidence, far from being tainted by its illegal source, purifies the seizure.

Canadian law is in accord with English law in holding illegally obtained evidence admissible. Regina v. Doyle, 12 Ont. 347 (Q. B. D. 1886); King v. Hawkins, 35 Queb. K. B. 96 (1923).

rule which it declared to be the law. The court was the Supreme Court of Massachusetts. In *Commonwealth* v. *Dana*,[13] decided in 1841 on an appeal from a conviction for the illegal possession of lottery tickets, the court held that the seizure of the lottery tickets had been lawful. By way of dictum, however, the opinion stated that even if illegally seized, the tickets would still be admissible; the court, in the single paragraph devoted to this point, foreshadowed the arguments later developed to a greater extent by the exponents of the rule of admissibility. "If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question."[14]

The rule as stated in the *Dana* case was adopted with few exceptions by all courts which had occasion to rule on this issue in the next few decades.[15] It was held that evidence relevant to the issue was admissible regardless of how it had been obtained,[16] whether the illegal act was committed by a private individual[17] or a public officer,[18] and whether the proceeding was a civil suit for damages[19] or a criminal prosecution.[20] The reason usually assigned for ignoring the method by which the evidence was obtained was that the

[13] 2 Metc. 329 (Mass. 1841).

[14] *Id.* at 337.

[15] 1 GREENLEAF, EVIDENCE (15th ed. 1892) § 254a. The first square holding was State v. Flynn, 36 N. H. 64 (1858); Plumb, *Illegal Enforcement of the Law* (1939) 24 CORNELL L. Q. 337, 354.

The earlier cases are collected in 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2183, n. 1; Note (1923) 24 A. L. R. 1408, 1411. Among the few decisions rejecting evidence because illegally obtained were United States v. Mounday, 208 Fed. 186 (D. C. Kan. 1913); State v. Sheridan, 121 Iowa 164, 96 N. W. 730 (1903); State v. Slamon, 73 Vt. 212, 50 Atl. 1097 (1901). A line of decisions in the Georgia Court of Appeals excluded evidence disclosed by illegal search of the person, Underwood v. State, 13 Ga. App. 206, 78 S. E. 1103 (1913). See Boyd v. United States, 116 U. S. 616, 621, 6 Sup. Ct. 524, 527 (1886).

[16] "Seemingly no one has considered the contention that evidence legally obtained, but obtained in contravention of some moral or ethical principle, is inadmissible, of sufficient merit to warrant an allegation of error or a decision in a court whose reports come down to us." 5 JONES, COMMENTARIES ON EVIDENCE (Rev. 2d ed. 1926) § 2075.

[17] Imboden v. People, 40 Colo. 142, 90 Pac. 608 (1907); Commonwealth v. Everson, 123 Ky. 330, 96 S. W. 460 (1906); State v. Mathers, 64 Vt. 101, 23 Atl. 590 (1891).

[18] People v. Cotta, 49 Cal. 166 (1874); State v. Burroughs, 72 Me. 479 (1881); State v. Flynn, 36 N. H. 64 (1858).

[19] Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E. D. Pa. 1912); Sullivan v. Nicoulin, 113 Iowa 76, 84 N. W. 978 (1901).

[20] See note 18 *supra*.

court would not halt the progress of the trial to determine a "collateral" issue, having no bearing on the outcome of the litigation at hand.[21]

PART II

The Trend of Decisions as to Admissibility of Illegally Seized Evidence Subsequent to the Weeks *Case.*

A. *In Federal Courts.*

The inclination of the United States Supreme Court to deviate from the well established rule of admissibility was first manifested in *Boyd* v. *United States.*[22] This was an appeal from a judgment of forfeiture in favor of the United States on an information filed to confiscate certain property alleged to have been illegally imported. On the trial it became important to show the quantity and value of property of a similar nature, previously imported. The United States, under authority of a statute governing this procedure, applied for an order requiring the defendants to produce the invoice of this property. The defendants in obedience to the order produced the invoice, but objected to its admissibility on the ground that the use of this evidence violated their constitutional rights under the Fourth and Fifth Amendments of the Federal Constitution. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The Fifth Amendment declares that no person "shall be compelled in any criminal case to be a witness against himself". The statute under which the Government moved for production of the invoice provided that on failure to produce the papers required, the allegations stated in the motion would be taken as confessed. The Court held that the statute and the order issued thereunder were a violation of the Fifth Amendment inasmuch as the production of papers compelled defendants to bear witness against themselves, and suits for penalties and forfeitures were of a quasi-criminal nature and therefore within the constitutional guaranty. This would have been sufficient to decide the case, but the Court went much farther in declaring that there had also been an infringement of defendant's rights under the Fourth Amendment, since a compulsory production of papers was tantamount to a search and seizure. Moreover, an extended review of the history of the Fourth Amendment led the Court to decide that the compulsory production of the invoice was an *unreasonable* search and seizure within the condemnation of the Amendment.

[21]Note (1911) 136 Am. St. Rep. 135, 142.
[22]116 U. S. 616, 6 Sup. Ct. 524 (1886).

"We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself".[23] Two judges, concurring in the result, were of the opinion that the order violated only the guaranty under the Fifth Amendment, and that no search and seizure were involved.

The dictum in the *Boyd* case that admission of evidence obtained by unlawful search and seizure would be equivalent to compelling a man to be a witness against himself, was thus a pronouncement that contrary to the accepted belief, illegally seized evidence should not be received on the trial. In other words, the merging of the Fifth Amendment with the Fourth, added to the Fourth a definite rule, heretofore lacking, concerning the evidentiary result in case its terms should be violated. This conclusion was reached without any discussion of the common law doctrine as to admissibility of illegally obtained evidence.[24]

The confusion caused by the assimilation of the two Amendments in the *Boyd* case was clarified to some extent by the decision of the Supreme Court in *Adams* v. *New York*.[25] The defendant there was convicted of possession of certain gambling paraphernalia. At the time of his arrest, the police searched his premises and seized not only policy slips but many of his private papers as well. The latter were introduced in evidence for the purpose of identifying handwriting of the defendant upon the slips and to show that the office where the slips were found was occupied by him. The defendant

[23] *Id.* at 633, 6 Sup. Ct. at 534.

[24] The *Boyd* case dictum actually extended to documents obtained by even a lawful search making such documents inadmissible as a form of testimonial compulsion, forbidden by the Fifth Amendment. Professor Wigmore, severely criticizing the reasoning in the *Boyd* case, points out that this fallacy was soon corrected, for in Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372 (1904), the Supreme Court held that the accused was not compelled to incriminate himself by the reception in evidence of documents seized from him (whether legally or illegally the Court does not decide). 8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2184, 2264.

[25] 192 U. S. 585, 24 Sup. Ct. 372 (1904).

objected to the admission of these private papers, resting his objections in part on the Fourth and Fifth Amendments of the Federal Constitution. The Supreme Court, upholding the Court of Appeals of New York,[26] decided that it was unnecessary to consider whether the papers were lawfully or unlawfully seized, for "the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony".[27] It further held, in a clear separation of the Fourth and Fifth Amendments, that the accused was not compelled to incriminate himself by admission of the seized papers, inasmuch as he did not take the witness stand and was not compelled to testify concerning the papers or make any admission concerning them. It thus reverted to the orthodox view of the Fifth Amendment, that the privilege therein guaranteed is against disclosure through legal process as a witness.[28] The opinion carefully distinguishes the *Boyd* case on the ground that the statute there held unconstitutional virtually compelled the defendant to furnish testimony against himself, but the *Adams* case undoubtedly had the effect of repudiating the dictum in *Boyd* v. *United States* that an unlawful search and seizure was tantamount to compulsory self-incrimination and therefore the evidence they yielded was inadmissible.

The *Adams* case stood unchallenged for a decade, when *Weeks* v. *United States*[29] entrenched the position of the Court firmly in opposition to admission of evidence seized in violation of the Fourth Amendment. The disputed evidence in that case consisted of papers taken by the United States marshal from the defendant's house without a warrant some time after the defendant's arrest. The defendant's petition before trial for return of the papers was denied. The Supreme Court reversed the conviction on the ground that admission of such evidence, when timely application had been made for its return, would constitute an invasion of defendant's rights under the Fourth Amendment. The Court declared that if such evidence were held admissible, the Fourth Amendment would be of no value and "might as well be stricken from the Constitution".[30] The Court held that two features distinguished the *Adams* case from the one before it: (1) The papers to which objection was raised in the *Adams* case "were incidentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen".[31] (2) Since no motion was made before trial in the *Adams* case,

[26]People v. Adams, 176 N. Y. 351, 68 N. E. 636 (1903).
[27]192 U. S. 585, 594, 24 Sup. Ct. 372, 374 (1904).
[28]8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2263, 2264.
[29]232 U. S. 383, 34 Sup. Ct. 341 (1914).
[30]*Id.* at 393, 34 Sup. Ct. at 344.
[31]*Id.* at 395, 34 Sup. Ct. at 345.

the Court was bound by the rule that a collateral issue may not be raised to determine the source of competent testimony. On the first point, it may be noticed that the Court in the *Adams* case ruled unequivocally that in accordance with the common law doctrine stated in *Commonwealth* v. *Dana, Legatt* v. *Tollervey,* and *Jordan* v. *Lewis,*[32] it would not examine the source of the evidence and accordingly it avoided stating anywhere in the opinion whether the seizure of defendant's papers was lawful or unlawful. As to the second attempted basis of distinction, the requirement of a motion before trial does not render the determination concerning the source of evidence less "collateral", which means "relevant to the issue". There seems to be no sound reason for requiring this particular collateral issue to be decided before trial, when objections to admissibility of evidence on other grounds—for instance, the credibility of a confession and the competency of witnesses, are considered as a matter of course at the trial.[33]

Whatever the unsoundness of its legal theory, the principle of the *Weeks* case has frequently been reiterated and expanded by the Supreme Court. In *Silverthorne Lumber Co.* v. *United States,*[34] it was held that information gained through illegally seized documents which had been returned to the owner could not be used at the trial. In *Gouled* v. *United States,*[35] the removal of papers from the office of the defendant surreptitiously by a federal agent was declared to be an unreasonable search and seizure, and the admission of such papers in evidence, a violation of the Fifth Amendment upon authority of the *Boyd* case. *Agnello* v. *United States*[36] held that the rule excluding from evidence illegally seized articles or property extended to contraband such as cocaine. Nor could such evidence be introduced against the defendant in rebuttal of his testimony on cross-examination that he never saw the article.

The method employed in the *Weeks* case to circumvent the decision in *Adams* v. *New York* by requiring a motion before trial has led to a rule of practice in federal courts still followed when the defendant in criminal proceedings desires the suppression of illegally seized evidence. In case of failure to test admissibility on this score by a preliminary motion, the objection will not be entertained upon the trial.[37] This rule is subject to two

[32]See notes 7, 8, 13 *supra.*

[33]These criticisms are voiced by 8 WIGMORE, EVIDENCE (3d ed. 1940) § 2184; Plumb, *Illegal Enforcement of the Law* (1939) 24 CORNELL L. Q. 337, 355, 356.

[34]251 U. S. 385, 40 Sup. Ct. 182 (1920).

[35]255 U. S. 298, 41 Sup. Ct. 261 (1921).

[36]269 U. S. 20, 46 Sup. Ct. 4 (1925).

[37]*See* Segurola v. United States, 275 U. S. 106, 112, 48 Sup. Ct. 77, 79 (1927); (1938)

exceptions permitting the issue first to be raised on trial (1) when the defendant has not previously been informed that evidence has been seized and is to be used against him,[38] (2) when the illegal seizure is not disputed but is admitted at the time the evidence is offered at the trial.[39] Despite its accidental origin, this procedural requirement may be rationalized by explanation that a preliminary motion affords the prosecution an opportunity to prepare to defend itself against this attack without delaying the trial. This is unnecessary, however, where it would have been impossible for the defendant, through lack of knowledge, to raise the objection before trial, or where the prosecution admits the facts and therefore requires no time for preparation to refute them.

Some of the Supreme Court cases apply the doctrine of the *Weeks* case to hold that papers or articles should be suppressed if seized solely for the purpose of securing evidence of a crime. Such seizures are unreasonable, even if made under a search warrant accurately describing the property, and the articles and information gained thereby are inadmissible.[40] The distinction between the use of search warrants for the purpose of securing evidence and for the purpose of seizing instrumentalities of the crime is stated by the Court as follows: "They (search warrants) may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but . . . they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken".[41]

Another limitation on the federal rule excluding illegally seized evidence which deserves notice here is that such evidence will be admitted if the illegal act has been committed by one not an agent of the Federal Government. The Fourth Amendment is not applicable to such cases inasmuch as it refers

8 BROOKLYN L. REV. 239; (1933) 1 U. OF CHI. L. REV. 120; Thormodsgard, *The Agnello Case and the Seasonable Demand Rule* (1927) 1 DAK. L. REV. 1. The more recent federal cases are collected in Notes (1944) 150 A. L. R. 573, (1941) 134 A. L. R. 826.

[38]Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261 (1921).

[39]Agnello v. United States, 269 U. S. 20, 46 Sup. Ct. 4 (1925); Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266 (1921).

[40]Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261 (1921); Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 Sup. Ct. 153 (1931); United States v. Lefkowitz, 285 U. S. 452, 52 Sup. Ct. 420 (1932).

[41]Gouled v. United States, 255 U. S. 298, 309, 41 Sup. Ct. 261, 265 (1921).

only to governmental action. *Burdeau* v. *McDowell*[42] was an independent proceeding to enjoin a public officer from using in criminal proceedings certain papers taken without permission from petitioner's office by a private individual without knowledge of the government and turned over several months later to the Department of Justice. It was held that the papers might be retained by the United States for use in evidence against the petitioner. Mr. Justice Brandeis, in a dissenting opinion in which Mr. Justice Holmes concurred, declared that the evidence should be rejected even though no constitutional provision had been violated. The case is significant in defining the position of the Court towards illegally obtained evidence. It demonstrates that the Court still adhered to the ancient rule admitting such evidence and that the principle of exclusion established by the *Weeks* case was merely an exception to that rule, an exception confined solely to the exclusion of evidence obtained in violation of a constitutional right.[43]

Under the rule of the *Burdeau* case, evidence illegally seized by a state or local officer acting solely on behalf of his own government is admissible in criminal proceedings in a federal court, where he is regarded as a private individual; but if he acts as agent for the United States in enforcing a federal law, evidence secured by him in contravention of the Fourth Amendment will be rejected.[44] On the other hand, the presence of a federal officer at an illegal search by state officers is not sufficient cause for exclusion of the evidence thereby obtained, but his participation in such a search for the purpose of obtaining evidence of a federal offense will cause the court to exclude it under the principle of the *Weeks* case.[45] These distinctions are admittedly difficult to apply. They are of practical importance, however, in wire tapping cases in which the frequent cooperation of federal and state police is likely to raise similar problems.[46]

B. *In State Courts.*

The *Weeks* case and succeeding cases which spelled out the so-called

[42]256 U. S. 465, 41 Sup. Ct. 574 (1921).

[43]This distinction is clearly set forth in 5 JONES, COMMENTARIES ON EVIDENCE (Rev. 2d ed. 1926) § 2076; Note (1938) 10 ROCKY MT. L. REV. 284.

[44]Gambino v. United States, 275 U. S. 310, 48 Sup. Ct. 137 (1927).

[45]Byars v. United States, 273 U. S. 28, 47 Sup. Ct. 248 (1927). In Anderson v. United States, 318 U. S. 350, 63 Sup. Ct. 599 (1943), the Supreme Court excluded evidence of confessions obtained illegally by local officers with the cooperation of federal officers.

[46]For the extent of cooperation generally, see speech by District Attorney Thomas E. Dewey read at the New York State Constitutional Convention in 1938. 1 N. Y. St. Const. Conv., Rev. Record, p. 372. In *Re* Milburne, 77 F. (2d) 310 (C. C. A. 2d, 1935) the prosecutions under federal law originated in wire-tapped information secured by local police.

federal rule and its qualifications were in no way binding on the courts of the various states. The Fourth and Fifth Amendments of the Federal Constitution were adopted at the demand of the states to protect their citizens against action of the Federal Government,[47] and hence it is well established that these amendments are limitations on the powers of the Federal Government only.[48] The "due process" clause of the Fourteenth Amendment, which is applicable to the states, has been held not to include the guaranties against unreasonable search and seizure and compulsory self-incrimination contained in the Fourth and Fifth Amendments.[49] The state courts were therefore free to admit or exclude illegally seized evidence in accordance with their interpretations of their own constitutional provisions. All states except New York had provisions which correspond to the Fourth Amendment of the United States Constitution,[50] and none contained an express provision concerning the admission of evidence secured in contravention thereof.[51]

While the *Weeks* case exerted no compulsion on the state courts its influence was profoundly felt. As noted before, at one time the almost unani-

[47]GREENMAN, WIRE TAPPING, ITS RELATION TO CIVIL LIBERTIES (1938) 8-12.

[48]Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14 (1908); Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 21 (1887).

[49]Palko v. Connecticut, 302 U. S. 319, 58 Sup. Ct. 149 (1937); Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14 (1908); People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926), *cert. denied*, 270 U. S. 657, 46 Sup. Ct. 353 (1925).

[50]ALA. CONST. Art. I, § 5; ARIZ. CONST. Art. 2, § 8; ARK. CONST. Art. II, § 15; CAL. CONST. Art. I, § 19; COLO. CONST. Art. II, § 7; CONN. CONST. Art. I, § 8; DEL. CONST. Art. I, § 6; FLA. CONST., DECL. RIGHTS, § 22; GA. CONST. Art. I, § 1, ¶ XVI; IDAHO CONST. Art. I, § 17; ILL. CONST. Art. II, § 6; IND. CONST. Art. I, § 11; IOWA CONST. Art. I, § 8; KAN. CONST., BILL RIGHTS, § 15; KY. CONST., BILL RIGHTS, § 10; LA. CONST. Art. I, § 7; ME. CONST. Art. I, § 5; MD. CONST., DECL. RIGHTS, Art. 26; MASS. CONST. Pt. I, Art. XIV; MICH. CONST. Art. II, § 10; MINN. CONST. Art. I, § 10; MISS. CONST. § 23; MO. CONST. Art. II, § 11; MONT. CONST. Art. III, § 7; NEB. CONST. Art. I, § 7; NEV. CONST. Art. I, § 18; N. H. CONST. Pt. I, Art. 19; N. J. CONST. Art. I, ¶ 6; N. M. CONST. Art. 2, § 10; N. C. CONST. Art. I, § 15; N. D. CONST. § 18; OHIO CONST. Art. I, § 14; OKLA. CONST. Art. II, § 30; ORE. CONST. Art. I, § 9; PA. CONST. Art. I, § 8; R. I. CONST. Art. I, § 6; S. C. CONST. Art. I, § 16; S. D. CONST. Art. VI, § 11; TENN. CONST. Art. I, § 7; TEX. CONST. Art. I, § 9; UTAH CONST. Art. I, § 14; VT. CONST. Ch. I, Art. 11; VA. CONST. Art. I, § 10; WASH. CONST. Art. I, § 7; W. VA. CONST. Art. III, § 6; WIS. CONST. Art. I, § 11; WYO. CONST. Art. 1, § 4.

A provision forbidding unreasonable searches and seizures was not inserted in the New York State Constitution until 1938. See Part V of this Study.

[51]The Constitution of the State of Michigan now includes a provision that the search and seizure section shall not be construed to bar from evidence in any criminal proceeding certain specified kinds of dangerous weapons seized by a peace officer outside a dwelling house. MICH. CONST. Art. II, § 10. This provision was not adopted until 1936, however.

A proposal to make evidence obtained by unlawful search inadmissible failed to pass the 1921 Constitutional Convention of Louisiana. See Journal of Constitutional Convention of Louisiana, 423, 454, 471, 1011. And see State v. Fleckinger, 152 La. 338, 93 So. 115 (1922).

mous position of the American courts was that evidence illegally ohtained, whether in violation of a statute or a constitutional provision, was nevertheless admissible.[52] The dictum in the *Boyd* case attracted scarcely any following,[53] but after the *Weeks* decision and with the enactment of the National Prohibition Act, the situation was ripe for a change. The indiscriminate raids of the prohibition agents and the fact that many defendants were erstwhile law-abiding citizens rather than hardened criminals led court after court to adopt the rule of the *Weeks* case.[54] The theoretical justification for the change was that the requirement of a preliminary motion obviated the old objection that the consideration of the source of evidence was a "collateral issue" and that determination of this issue would unduly delay the trial.[55] Surveys from time to time indicated a growing tide in favor of the rule excluding the evidence. In 1923, nine courts of last resort in the states had adopted the federal rule completely or in modified form;[56] in 1928, this number had increased to fifteen,[57] and in 1934, to eighteen,[58] which is the count at present. The states now in this group are Florida,[59] Idaho,[60] Illinois,[61] Indiana,[62] Kentucky,[63] Michigan,[64] Mississippi,[65] Missouri,[66] Montana,[67] Oklahoma,[68] Oregon,[69] South Dakota,[70] Tennessee,[71] Texas,[72] Wash-

[52]See Part I *supra.*

[53]Plumb, *Illegal Enforcement of the Law* (1939) 24 CORNELL L. Q. 337, 355.

[54]The part played by the Prohibition Act in the adoption of the rule of the *Weeks* case is discussed by Waite, *Reasonable Search and Research* (1938) 86 U. PA. L. REV. 623; Roberts, *Does the Search and Seizure Clause Hinder the Proper Administration of the Criminal Justice?* (1929) 5 WIS. L. REV. 195; Wilson, *Attempts to Nullify the Fourth and Fifth Amendments to the Constitution* (1925) 32 W. VA. L. Q. 128.

[55]Plumb, *Illegal Enforcement of the Law* (1939) 24 CORNELL L. Q. 337, 356.

[56]Note (1923) 24 A. L. R. 1408, 1417.

[57]Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 MINN. L. REV. 1.

[58]Note (1936) 16 BOSTON U. L. REV. 480.

[59]Mathis v. State, 153 Fla. 750, 15 So. (2d) 762 (1943).

[60]State v. Arregui, 44 Idaho 43, 254 Pac. 788 (1927).

[61]People v. Grod, 385 Ill. 584, 53 N. E. (2d) 591 (1944).

[62]Vukadanovich v. State, 205 Ind. 34, 185 N. E. 641 (1933).

[63]Toncray v. Commonwealth, 296 Ky. 400, 177 S. W. (2d) 376 (1944).

[64]People v. Stein, 265 Mich. 610, 251 N. W. 788 (1933). Art. II, § 10 of the Michigan Constitution, adopted in 1936, provides that certain illegally seized evidence is admissible. See note 51 *supra.*

[65]Cochran v. State, 191 Miss. 273, 2 So. (2d) 822 (1941). An attempt by the Legislature to provide that evidence seized without proper search warrants should be admissible in prosecutions under the Mississippi prohibition law, was held unconstitutional in Orick v. State, 140 Miss. 184, 105 So. 465 (1925).

[66]State v. Wilkerson, 349 Mo. 205, 159 S. W. (2d) 794 (1942).

[67]State *ex rel.* Stange v. District Court, 71 Mont. 125, 227 Pac. 576 (1924).

[68]Dade v. State, 188 Okla. 677, 112 P. (2d) 1102 (1941).

[69]State v. McDaniel, 115 Ore. 187, 231 Pac. 965 (1925).

[70]State v. McClendon, 64 S. D. 320, 266 N. W. 672 (1936).

[71]Parker v. State, 177 Tenn. 380, 150 S. W. (2d) 725 (1941).

[72]The Texas Code of Criminal Procedure (Vernon, 1941) art. 727a provides: "No

ington,[73] West Virginia,[74] Wisconsin,[75] and Wyoming.[76] Alaska also follows the federal rule.[77] A statute in Maryland, enacted in 1935, provides for the exclusion of illegally seized evidence in misdemeanor cases,[78] but such evidence is still admissible in felony cases.[79] North Carolina attempted to adopt the federal rule by statute in 1937,[80] but it was so drafted that the courts held that evidence obtained under an illegal warrant is inadmissible, while evidence obtained illegally without any warrant is admitted.[81] The states in which illegally obtained evidence is held admissible are still in the majority. They are Alabama,[82] Arizona,[83] Arkansas,[84] California,[85] Colorado,[86] Connecticut,[87] Delaware,[88] Georgia,[89] Iowa,[90] Kansas,[91] Louisiana,[92] Maine,[93] Massachusetts,[94] Minnesota,[95] Nebraska,[96] Nevada,[97] New Hampshire,[98] New Jersey,[99] New Mexico,[100] New York,[101] North Dakota,[102] Ohio,[103] Pennsyl-

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evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

[73]State v. Raum, 172 Wash. 680, 21 P. (2d) 291 (1933).
[74]State v. Lacy, 118 W. Va. 345, 190 S. E. 344 (1937).
[75]Mularkey v. State, 196 Wis. 400, 220 N. W. 234 (1928).
[76]State v. Scott, 41 Wyo. 438, 286 Pac. 390 (1930).
[77]United States v. Doumain, 7 Alaska 31 (4th Div. 1923).
[78]MD. ANN. CODE (Flack, 1939) art. 35, 5.
[79]Marshall v. State, 182 Md. 379, 35 A. (2d) 115 (1943).
[80]N. C. GEN. STAT. (1943) §§ 15-27.
[81]State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938).
[82]Banks v. State, 207 Ala. 179, 93 So. 293 (1921).
[83]State v. Frye, 58 Ariz. 409, 120 P. (2d) 793 (1942).
[84]Woolem v. State, 179 Ark. 1119, 20 S. W. (2d) 185 (1929).
[85]People v. Gonzales, 20 Cal. (2d) 165, 124 P. (2d) 44 (1942), *cert. denied,* 317 U. S. 657, 63 Sup. Ct. 155 (1942).
[86]Massantonio v. People, 77 Colo. 392, 236 Pac. 1019 (1925).
[87]State v. Carol, 120 Conn. 573, 181 Atl. 714 (1935).
[88]State v. Episcopo, 37 Del. 439, 184 Atl. 872 (Ct. Gen. Sess. 1936).
[89]McIntyre v. State, 190 Ga. 872, 11 S. E. (2d) 5 (1940).
[90]State v. Nelson, 231 Iowa 177, 300 N. W. 685 (1941).
[91]State v. Kelley, 125 Kan. 805, 265 Pac. 1109 (1928).
[92]State v. Fleckinger, 152 La. 337, 93 So. 115 (1922).
[93]State v. Burroughs, 72 Me. 479 (1881).
[94]Commonwealth v. Wilkins, 243 Mass. 356, 138 N. E. 11 (1923).
[95]State v. Siporen, 215 Minn. 438, 10 N. W. (2d) 353 (1943).
[96]Kuxhaus v. State, 117 Neb. 514, 221 N. W. 439 (1928).
[97]Terrano v. State, 59 Nev. 247, 91 P. (2d) 67 (1939).
[98]State v. Agalos, 79 N. H. 241, 107 Atl. 314 (1919).
[99]State v. Merra, 103 N. J. L. 361, 137 Atl. 575 (1927).
[100]State v. Dillon, 34 N. M. 366, 281 Pac. 474 (1929).
[101]People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926). The law of New York is discussed *infra* Part V.
[102]State v. Fahn, 53 N. D. 203, 205 N. W. 67 (1925).
[103]State v. Lindway, 131 Ohio St. 166, 2 N. E. (2d) 490 (1936), *appeal dismissed for want of jurisdiction,* 299 U. S. 506, 57 Sup. Ct. 36 (1936).

vania,[104] South Carolina,[105] Utah,[106] Vermont,[107] and Virginia.[108] Rhode Island has not yet ruled on the question, although a dictum indicates that it favors the majority rule.[109] The controversial nature of the question is vividly illustrated by the development of the rule in some of the states. Its history is marked by the same vacillation and divided courts characteristic of the decisions in the United States Supreme Court.

PART III

The Federal Law of Wire Tapping

A. *The* Olmstead *Case*

The first stage of the history of the federal law of wire tapping is concerned chiefly with the admissibility of wire tapped evidence under the Fourth Amendment. The second stage, beginning with the decision in *Nardone* v. *United States*[110] in 1937 deals with its admissibility under section 605 of the Federal Communications Act.

The history begins in 1928,[111] when the United States Supreme Court was squarely faced with the question whether evidence secured by federal law enforcement officers by tapping telephone wires of the accused was admissible in criminal proceedings against him. The division of opinion which had marked the development of the law as to admissibility of illegally seized evidence also appeared in this phase of the controversy. By a majority of five to four, the Court in *Olmstead* v. *United States*,[112] held the evidence admissible, not, however, because it considered, contrary to the *Weeks* decision, that evidence secured in contravention of the Fourth Amendment should be received, but for the reason that wire tapping is not a "search" or "seizure" within the meaning of that Amendment. Defendants had been convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act. The facts disclosed

[104]Commonwealth v. Dabbierio, 290 Pa. 174, 138 Atl. 679 (1927).
[105]West Greenville v. Harris, 159 S. C. 524, 157 S. E. 836 (1931).
[106]State v. Aime, 62 Utah 476, 220 Pac. 704 (1923).
[107]State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934).
[108]Hall v. Commonwealth *ex rel.* South Boston, 138 Va. 727, 121 S. E. 154 (1924).
[109]State v. Chester, 46 R. I. 485, 129 Atl. 596 (1925).
[110]302 U. S. 379, 58 Sup. Ct. 275 (1937).
[111]Prior to this, the only federal law on the subject was a statute passed by Congress in 1918 prohibiting all wire tapping in order to protect the secrecy of government communications. 40 STAT. 1017 (1918). This was operative only during the period of governmental operation of the telephone and telegraph systems. Accordingly it expired in 1919 when these properties were returned to privately owned companies. *Wire tapping, Congress, and the Department of Justice* (1941) 9 INT. JURID. ASS'N. BULL. 97.
[112]277 U. S. 438, 48 Sup. Ct. 564 (1928).

that they conducted a liquor business on a million dollar scale. The evidence leading to their conviction was obtained largely by intercepting messages on the telephones of the conspirators by federal prohibition officers. The tapping was done without committing any trespass upon the property of the defendants. The majority of the Court, by Mr. Chief Justice Taft, reviewed its previous decisions relating to illegally seized evidence and found "the misuse of governmental power of compulsion" a common element of all. The Court declared that *Gouled* v. *United States* carried the inhibition against unreasonable searches and seizures to the "extreme limit", but pointed out that even in that case "there was actual entrance into the private quarters of defendant and the taking away of something tangible". By contrast, the *Olmstead* case involved only "voluntary conversations secretly overheard". The Court's reasoning ran as follows: the protection afforded by the Fourth Amendment extended only to the material things enumerated—to one's person, or his house, papers or effects. The words "search" and "seizure" cannot be construed to prohibit gathering of evidence by hearing or sight. One who speaks over a telephone from his house intends to project his voice beyond his house and messages passing over these wires are not within the protection of the Fourth Amendment. There was no infringement of defendant's rights under the Fifth Amendment either on the ground (stated in the *Boyd* case) that the Fourth had been violated, or independently of the Fourth, since the defendant's conversations were completely voluntary.

The Court rejected the argument that the evidence should be held inadmissible because the method of obtaining it was unethical. This would be not only at variance with the common law doctrine but also contrary to general experience that evidence in criminal cases is frequently "not obtained by conformity to the highest ethics".

Finally since the wire tapping was done in the State of Washington, the Court referred to the Washington statute which provided that "Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor".[113] The majority opinion pointed out that the statute did not declare evidence obtained by its violation inadmissible, and that, even if federal officers were punishable thereunder, a statute passed twenty years after the admission of the state into the Union could not affect federal rules of evidence. Having held that the law of evidence of the State of Washington did not control, the Court further held with reference to the violation of the

[113]WASH. COMP. STAT. ANN. (Remington's, 1922) § 2656-18.

Washington statute, that the federal law of evidence was that of the common law, which ignores the illegality of the methods by which the evidence may have been obtained. The Court concluded that the illegal act of the federal officers in obtaining the evidence by wire tapping, did not affect its admissibility.

Mr. Justice Holmes, in a dissenting opinion, without deciding whether the case came within the scope of the Fourth or Fifth Amendment, expressed the belief that the Government should not make use of evidence obtained by any criminal act. "No distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed".[114]

The dissent of Mr. Justice Brandeis rested principally on the belief that the words of the Fourth and Fifth Amendments should not be read so literally, that they do not protect the right of privacy which they were framed to safeguard. They should be interpreted to prevent the "subtler and more far-reaching means of invading privacy"[115] which have become available to the Government since the adoption of these Amendments. Independently of the constitutional question, he agreed with Mr. Justice Holmes that the Government should not obtain a conviction through illegal acts of its own officers. He believed that the equitable doctrine denying relief to one who comes into court with unclean hands should be extended to criminal cases in order to maintain respect for the law and promote confidence in the administration of justice. Mr. Justice Butler pointed out in his dissent that wire tapping constituted a physical interference with the wires which was literally a search. If the interception of messages was not literally a seizure, still he was of the opinion that it was within the spirit of the constitutional guaranty of the Fourth Amendment. Mr. Justice Stone also wrote a brief dissenting opinion.

The *Olmstead* case again emphasized that the Supreme Court was wedded to the common law doctrine of admission of evidence illegally obtained. It was immaterial that the evidence in question was secured by federal officers through commission of a misdemeanor under state statute. So long as no infraction of a constitutional guaranty was involved, bringing the case within the exception to the rule established by the *Weeks* case, the evidence was admissible. Mr. Justice Holmes and Mr. Justice Brandeis pleaded for an

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[114] 277 U. S. 438, 470, 48 Sup. Ct. 564, 575 (1928).
[115] *Id.* at 473, 48 Sup. Ct. at 570.

overthrow of the common law rule in all cases where the illegal act was committed by public officers, whether that act was a violation of a statute or constitutional provision. Aside from the considerations of policy, to be discussed later in this study,[116] this was the logical position to assume; if a preliminary motion opened the way for consideration of this "collateral" issue in search and seizure cases, it could do the same in cases of statutory violations.[117]

The other basis for decision of the *Olmstead* case, that wire tapping was not a search and seizure within the meaning of the Fourth Amendment, finds some support in analogous decisions. In general, securing evidence by use of the senses, as through sight or hearing, without further exploration of hidden places, does not constitute a search, and this is true even though the senses are aided by a device such as a flashlight or dictaphone.[118] Eavesdropping has been a method frequently employed by the police to secure evidence of crime, and the disrepute in which it is generally held has not prevented the courts from admitting the evidence so obtained.[119] This method is so thoroughly accepted that in some cases, the evidence obtained apparently has not been challenged by the defense on the basis of illegality.[120]

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[116] *Infra* Part VI.

[117] Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 MINN. L. REV. 1.

[118] United States v. Lee, 274 U. S. 559, 47 Sup. Ct. 746 (1927) (flashing light on boat by officers of coast guard held not a search). "Such use of a searchlight is comparable to the use of a marine glass or a field glass." *Id.* at 563, 47 Sup. Ct. at 748; Hester v. United States, 265 U. S. 57, 44 Sup. Ct. 445 (1924) (officers from concealed position in field saw defendant with whiskey bottle); Burt v. United States, 139 F. (2d) 73 (C. C. A. 5th, 1943) (officer saw whiskey cans through open door); Smith v. United States, 2 F. (2d) 715 (C. C. A. 4th, 1924) (officers turned flashlight on floor of car and saw liquor; it is "not a search to observe that which is open and patent, in either sunlight or artificial light." *Id.* at 716.) Safarik v. United States, 62 F. (2d) 892 (C. C. A. 8th, 1933) held that flashing a light through the window of a chicken coop was not an "unreasonable search." See note 119 *infra* for dictaphone cases.

[119] United States v. Harnish, 7 F. Supp. 305 (N. D. Me. 1934) (radio direction finder); People v. Cotta, 49 Cal. 166 (1874) (police officer listened to conversation in defendant's cell); Goode v. State, 158 Miss. 616, 131 So. 107 (1930) (sheriff overheard conversation from road); State v. Hester, 137 S. C. 145, 134 S. E. 885 (1926) (police used detectaphone to eavesdrop on conversation in defendant's cell); Hunter v. State, 111 Tex. Cr. App. 252, 12 S. W. (2d) 566 (1928) (police listened at window).

Eavesdropping was an indictable offense at common law. 4 BL. COMM. 168, 2 WHARTON, CRIMINAL LAW (12th ed. 1932) § 1718. It is still punishable as a statutory offense in some states. *See,* for instance, GA. CODE ANN. (1935) §26-§2001; MASS. ANN. LAWS (1942) Ch. 272, § 99; S. C. CODE (1942) §1192-1.

[120] Wallace v. United States, 291 Fed. 972 (C. C. A. 6th, 1923) (wire tapping); Schoborg v. United States, 264 Fed. 1 (C. C. A. 6th, 1920) (dictograph); People v. Schultz, 18 Cal. App. (2d) 485, 64 P. (2d) 440 (1937) (dictaphone); Kidd v. People, 97 Colo. 480, 51 P. (2d) 1020 (1935) (dictograph); Commonwealth v. Wakelin, 230 Mass. 567, 120 N. E. 209 (1918) (conversation in defendant's cell overheard by dictograph).

The physical interference with the wires which is necessary in wire tapping distinguishes it from cases of securing evidence by seeing or hearing, and therefore, may more aptly be held a "search". Nothing tangible is carried away, however, so that it does not literally constitute a "seizure". In this respect, it differs from interception of letters and packages in the mails, which have been held to be within the protection of the Fourth Amendment.[121] The view that sealed letters may not be seized indiscriminately was a stumbling block to the majority in the *Olmstead* case, inasmuch as this form of interference, as may be true in wire tapping, occurs outside the sacred precincts of the curtilage. It was overcome, however, by the argument that the post office is directly under protection of the United States Government, and that mail is within the meaning of "papers and effects".

While it is probably true that the framers of the Constitution contemplated seizure only of tangible things in drafting the Fourth Amendment because other forms of seizure were unknown at the time, still, the force of Mr. Justice Brandeis' argument that protection against wire tapping is within the spirit of the Amendment cannot be denied. The history of the Amendment discloses that it was included in the Bill of Rights on the insistence of the states because of a strong opinion that it was necessary to safeguard homes against governmental intrusion so fearfully exemplified by use of the general warrant in England and of Writs of Assistance in the American Colonies.[122] The right which the Amendment was intended to protect in its largest sense was the right of privacy, and telephone messages would seem as deserving of protection in this respect as letters or papers. In fact, eavesdropping on private conversations has been held by at least two courts to be an invasion of the right of privacy for which damages may be recovered in a civil suit.[123]

It is possible that the Court in the *Olmstead* case decided the issue in favor of constitutionality in order to permit Congress to regulate wire tapping or outlaw it in accordance with the rise or ebb of the crime wave. A contrary

[121]Hoover v. McChesney, 81 Fed. 472 (C. C. D. Ky. 1897); and *see Ex parte* Jackson, 96 U. S. 727, 735 (1877).

[122]GREENMAN, WIRE TAPPING, ITS RELATION TO CIVIL LIBERTIES (1938) 5; Harno, *Evidence Obtained by Illegal Search and Seizure* (1925) 19 ILL. L. REV. 303. *See* Boyd v. United States, 116 U. S. 616, 625, 6 Sup. Ct. 524, 529 (1886) for the classic statement of the origin of the Fourth Amendment.

[123]McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S. E. (2d) 810 (1939) (listening by dictaphone to conversation in hospital room); Rhodes v. Graham, 238 Ky. 225, 37 S. W. (2d) 46 (1931) (wire tapping by private individuals). *But see* United States v. Goldman, 118 F. (2d) 310, 314 (C. C. A. 2nd, 1941) where the court said, "There was only an instance of eavesdropping which alone, though an invasion of privacy, is not a violation of a recognized legal right to privacy."

holding would have shut the door to any statutory relaxation allowing even supervised wire tapping. If the Court was influenced by this policy, it could reach its result only on the basis chosen, that wire tapping is not a search or seizure within the meaning of the Fourth Amendment. If it were held a search, it must be an unreasonable search, since wire tapping seldom has a purpose other than the procurement of evidence, which was held unconstitutional in the *Gouled* case.[124] And evidence secured by an unreasonable search is constitutionally inadmissible under the holding of the *Weeks* case.[125]

B. *Interpretation of Section 605, of the Federal Communications Act.*

In 1934, Congress passed the Federal Communications Act, which superseded the Federal Radio Commission Act and brought wire and radio communications under the control of the newly created Federal Communications Commission.[126] The new act repealed Section 27 of the Radio Act of 1927, which had provided: "No person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person."[127] In its stead, Section 605 of the Federal Communications Act was enacted.[128] This is set forth below with its four clauses indicated by bracketed numbers for ready reference in discussion of the cases interpreting it:

> Section 605. "Unauthorized publication or use of communications. [1] No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or in demand of other lawful authority; [2] and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; [3] and

[124]Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261 (1921). Later cases to the same effect were Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 Sup. Ct. 153 (1931); United States v. Lefkowitz, 285 U. S. 452, 52 Sup. Ct. 420 (1932).
[125]Note (1940) 53 HARV. L. REV. 863.
[126]48 STAT. 1064 (1934), 47 U. S. C. A. § 151 (Supp. 1946).
[127]44 STAT. 1172 (1927).
[128]48 STAT. 1103 (1934), 47 U. S. C. A. § 605 (Supp. 1946).

no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto, [4] and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."[128a]

Section 501 of the Act made the wilful and knowing violation of this section punishable by a fine of not more than $10,000.00 or by imprisonment for a term of not more than two years or both.[129]

Section 605 received little notice for several years. Now, as before, the only question relating to wire tapped evidence which was presented to the Federal Courts was its admissibility under the Constitution or under state statute. As to this, the courts, relying on the *Olmstead* case, received the evidence without much discussion.[130] The only case in which the question of admissibility of evidence under Section 605 was presented, ruled in the affirmative without discussing the point.[131]

Into this placid scene was injected the decision in *Nardone* v. *United States*.[132] The defendants, under indictment for smuggling alcohol, objected to testimony of federal agents to the substance of interstate communications overheard by them through tapping of telephone wires. The Supreme Court, reversing the judgment of conviction, held that under the second clause of Section 605, "no person not being authorized by the sender shall intercept

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128a *Ibid.*

129 48 STAT. 1100 (1934), 47 U. S. C. A., § 501 (Supp. 1946).

130 Valli v. United States, 94 F. (2d) 687 (C. C. A. 1st, 1938); United States v. Genello, 10 F. Supp. 751 (M. D. Pa. 1935), *Rev'd Mem.;* United States v. Jenello, 78 F. (2d) 1020 (C. C. A. 3d, 1935); Foley v. United States, 64 F. (2d) 1 (C. C. A. 5th, 1933); Kerns v. United States, 50 F. (2d) 602 (C. C. A. 6th, 1931). *See* Beard v. United States, 82 F. (2d) 837 (App. D. C. 1936), *cert. denied* 298 U. S. 655, 56 Sup. Ct. 675 (1936); *In re* Milburne, 77 F. (2d) 310 (C. C. A. 2nd, 1935); Bushouse v. United States, 67 F. (2d) 843 (C. C. A. 6th, 1933); Morton v. United States, 60 F. (2d) 696 (C. C. A. 7th, 1932). The last case held that it was error in order to discredit a government witness and show that he was over-zealous, not to permit his cross examination concerning his knowledge that he was violating a state statute in tapping telephone conversations.

131 Smith v. United States, 91 F. (2d) 556 (App. D. C. 1937).

132 302 U. S. 379, 58 Sup. Ct. 275 (1937).

any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person", the phrase "no person" comprehends federal agents and that "the ban on communication to 'any person' bars testimony to the content of an intercepted message". The United States had urged a contrary interpretation on the grounds: (1) That Congress, as evidenced by its refusal to adopt legislation outlawing wire tapping subsequent to the *Olmstead* decision and by the history of Section 605, did not intend to regulate the introduction of wire tapped evidence; (2) That general words in a statute are not applicable to the government; and (3) That the statute should not be given an interpretation which would impede the detection and punishment of crime. The Court acknowledged that several bills introduced in Congress forbidding the practice of wire tapping had failed to pass[133] (with one exception applicable only to the enforcement of the National Prohibition Act).[134] It also admitted that "the committee reports in connection with the Federal Communications Act dwell upon the fact that the major purpose of the legislation was the transfer of jurisdiction over wire and radio communication to the newly constituted Federal Communications Commission." It nevertheless concluded that the plain words of the statute forbade government agents to tap wires and divulge the information thus secured in court. It found this conclusion reenforced by the provision in the first clause of Section 605, applicable to employees of the carrier, permitting divulgence in answer to a lawful subpoena, whereas this provision was omitted from the second clause, concerning intercepted messages.

The Court overrode the second contention of the United States by holding that an exception to the doctrine that general words of a statute do not include the government is found where the statute is "intended to prevent injury and wrong".

In answer to the last argument, it was stated that "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution".

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[133]H. R. 23, 72d Cong., 1st Sess.; H. R. 5305, S. 1896, 72d Cong., 1st Sess. (1931).

[134]47 STAT. 1381 (1933). This was a provision in an appropriation bill that none of the funds thereby appropriated should be used for wire tapping to procure evidence of violation of the National Prohibition Act.

Mr. Justice Sutherland, dissenting, expressed the belief that the decision would enable "the most depraved criminals to further their criminal plans over the telephone; in the secure knowledge that even if these plans involve kidnapping and murder, their telephone messages can never be intercepted by officers of the law and revealed in court". He considered the words of the statute not sufficiently definite to bring about such an extreme result.

The criticism of the *Nardone* case has sometimes been voiced that it read into the statute a provision which Congress did not intend to include.[135] It is, in fact, true that the legislative history of Section 605 gives no inkling that Congress was therein dealing with a highly controversial rule of evidence. The debates in Congress contain no reference to it, and the Committee report barely recognizes its presence by stating that it "is based upon Section 27 of the Radio Act and extends it to wire communications."[136] This virtual silence on a question which normally elicits a flood of arguments, seems to indicate that Congress had no intention of legislating on this point.

Moreover, it was not ineluctable to hold that a statute, general in terms, designed to prevent injury and wrong, includes the acts of the government or public officers. In the case of other general statutes defining rights and duties, the courts have sometimes held that governmental conduct is not covered. For instance, speed regulations are held inapplicable to public officers pursuing a criminal.[137] The Court therefore had sound precedent for deciding that a statute forbidding disclosure of wire tapped evidence was inapplicable to public officers endeavoring to convict a criminal. Neither was the Court forced irresistibly to the conclusion that the prohibition against "divulging" wire tapped conversations includes giving testimony of these conversations. Statutes forbidding telegraph operators to make known the contents of messages have been held not to prevent their testifying to their contents.[138]

These considerations throw light on a statement in a later Supreme Court case that the decision in *Nardone* v. *United States* "was not the product of a merely meticulous reading of technical language. It was the translation

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[135]Notes (1940) 53 HARV. L. REV. 863; (1940) 34 ILL. L. REV. 758; (1939) 16 TEX. L. REV. 574.

[136]SEN. REP. No. 781, 73d Cong., 2d Sess. (1934) 11.

[137]Lilly v. West Virginia, 29 F. (2d) 61 (C. C. A. 4th, 1928); Edberg v. Johnson, 149 Minn. 395, 184 N. W. 12 (1921); State v. Gorham, 110 Wash. 330, 188 Pac. 457 (1920).

[138]Hall v. State, 208 Ala. 199, 201, 94 So. 59, 61 (1922) ("communicate in any way whatsoever" forbidden); Woods & Bradley v. Miller & Co., 55 Iowa 168 (1880); Henisler v. Freedman, 2 Pars. Sel. Cas. 274 (Pa. 1851) ("unlawful divulgence" prohibited).

into practicality of broad considerations of morality and public well-being."[139]

It is significant that the Court, swayed as it was purely by considerations of policy, reached an opposite result from the *Olmstead* case. It was, of course, able to do so without overruling its earlier decision because in the *Nardone* case it was interpreting the language of a statute, rather than the wording of the Fourth and Fifth Amendments.[140] Nevertheless, it weighed the same considerations—facilitation of the conviction of the criminal as against a danger of infringement of the right of privacy—and came to a different conclusion. The effect of its decision was, however, much more sweeping than an overruling of the *Olmstead* case, which would have excluded evidence of intercepted messages only in criminal cases, and only when a federal officer was instrumental in securing the evidence. The *Nardone* decision has the effect of forbidding evidence of intercepted messages in all proceedings of any nature and whether obtained by a federal agent, the local police or a private individual.[141]

It is interesting to note that the ruling in the *Nardone* case, far-reaching though it was, did not shake the adherence of the Supreme Court to the basic rule of evidence that a court will not interrupt a trial to determine the legality of the source of evidence. The court in the *Nardone* case was interpreting a statute which expressly forbade "divulgence" of certain information. The Court for reasons of policy construed this to prohibit testimony in a court of law. The *Nardone* decision is concerned solely with outlawing wire tapped evidence obtained in violation of Section 605, and cannot be construed as altering generally the common law rule holding evidence illegally obtained to be admissible—a rule which the Supreme Court had not questioned except in cases involving the Constitution.

The interpretation of Section 605 in the *Nardone* case brought this provision into sudden prominence. It was relied upon by the defense in several cases which reached the circuit courts in the next few years. When the question was squarely presented, the courts reversed the convictions on the authority of the *Nardone* decision.[142]

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[139]Nardone v. United States, 308 U. S. 338, 340, 60 Sup. Ct. 266, 267 (1939).

[140]That the *Nardone* decision was concerned only with statutory interpretation is the basis of the decision in Beard v. Sanford, 110 F. (2d) 527 (C. C. A. 5th, 1940) in which a petitioner for a writ of *habeas corpus,* convicted by wire tapped evidence, urged the first *Nardone* case, decided after his conviction, as a reason for granting the writ. The petition was denied on the ground that no constitutional right was involved in the *Nardone* case, and a mere statutory right did not furnish a basis for a writ of *habeas corpus.*

[141]GREENMAN, WIRE TAPPING, ITS RELATION TO CIVIL LIBERTIES (1938) 33; note (1940) 53 HARV. L. REV. 863.

[142]United States v. Bonanzi, 94 F. (2d) 570 (C. C. A. 2d, 1938); United States v.

The Supreme Court shortly after the *Nardone* decision had occasion again to interpret the scope of Section 605, and in the case of the same offenders.[143] In a new trial following the first decision, Nardone and his co-defendants were convicted. On appeal, the principal question was whether the trial judge "improperly refused to allow the accused to examine the prosecution as to the uses to which it had put the information unlawfully obtained"; that is, whether the prosecution was seeking to introduce evidence indirectly procured through information contained in the intercepted telephone conversations.[144] The Circuit Court, by Judge Learned Hand, held that no error had been committed, for Section 605, while forbidding the divulgence of the contents of tapped messages, did not forbid the divulgence of information indirectly secured from such messages. The Court expressed its fear that permission to the accused to investigate the source of all evidence offered by the prosecution would handicap the prosecution hopelessly. It stated that if it should allow such a procedure, the doctrine that evidence procured by an illegal search is incompetent, might also be subject to the same broad interpretation.

The Supreme Court reversed the Circuit Court. It did not attempt to justify its decision by an examination of the wording of Section 605. It weighed the opposing considerations, "on the one hand, the stern enforcement of the criminal law, on the other, protection of that realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design." It decided that the holding below "would largely stultify the policy which compelled" the decision in the first *Nardone* case by allowing the methods condemned by the statute a large field of usefulness. It pointed out, however, that the connection between the wire tapping and the evidence "may have become so attenuated as to dissipate the taint". The Court went on to formulate a procedure to be followed by a trial court where a similar

Bernava, 95 F. (2d) 310 (C. C. A. 2d, 1938); United States v. Reed, 96 F. (2d) 785 (C. C. A. 2d, 1938); *see* United States v. Jenello, 102 F. (2d) 587 (C. C. A. 3rd, 1939); Ginsberg v. United States, 96 F. (2d) 433 (C. C. A. 5th, 1938); and cases cited *infra* note 151 in which the additional question of the applicability of § 605 to intrastate communications was decided.

In United States v. Gallo, 123 F. (2d) 229 (C. C. A. 2nd, 1941); the defendant objected to the reception in evidence of records of the telephone company showing calls between himself and two co-defendants. The court held that admission of these records would not constitute a violation of § 605, for, even if recording of calls by the company could be deemed an interception, the parties to the call would have been deemed to consent to this well established practice.

[143]Nardone v. United States, 308 U. S. 338, 60 Sup. Ct. 266 (1939).

[144]The briefs disclose that the question arose when Nardone sought to strike the testimony of certain government witnesses on the ground that the government had discovered the existence of these witnesses by wire tapping.

question should be raised. "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire tapping was unlawfully employed. Once that is established . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin". It recognized the soundness of the objection raised by the Circuit Court to forcing the prosecution to a wholesale disclosure of its evidence before submission to the jury, but thought that the experience of a trial judge would enable him to distinguish between a genuine claim that a portion of the Government's evidence was tainted and a baseless attempt to extract information from the prosecution. The Court invoked the exception to the rule of seasonable objection established in the *Gouled* case by stating that if the defendant's claim should be made after the trial has commenced, the judge must "be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim". In the instant case, the Court did not question the timeliness of the defendant's objection to the proof since the Circuit Court did not. Mr. Justice McReynolds dissented from these views on the grounds stated in the opinion of the Circuit Court.

The decision in the second *Nardone* decision imports into the law of wire tapping the rule previously enunciated by the Supreme Court in the *Silverthorne* case as to evidence secured by illegal search and seizure, that the unlawful act not only vitiates the evidence seized, hut extends to all information traceable to such act.[145] As the Court said in the *Silverthorne* case, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all".[146] This result necessarily follows from the reason of the rules, that illegal searches and seizures on the one hand and securing wire tapped evidence in contravention of a statute on the other, are to be discouraged as violative of personal liberties by removing any incentive to employing them.[147]

[145]See discussion Part II A, *supra*.

[146]251 U. S. 385, 392, 40 Sup. Ct. 182, 183 (1920).

[147]It has been suggested (Note (1940) 53 HARV. L. REV. 863, 867) that the Supreme Court overlooked the analogy found in those decisions which, though refusing to receive an improperly induced confession, allow the introduction in evidence of facts, such as the finding of a body or stolen goods, discovered in consequence of information contained in the confession of the accused. State v. Turner, 82 Kan. 787, 109 Pac. 654 (1910); 3 WIGMORE, EVIDENCE (3d ed. 1940) § 856-§ 859. Improperly induced confessions are excluded, however, because they are untrustworthy. This objection does not extend

The language of the Court in fixing the burden of proof in wire tapping cases is not definite, and it has not been clarified by later decisions of the Supreme Court. The Second Circuit, in interpreting the language in the second *Nardone* case, in *United States* v. *Goldstein*,[148] decided that the statement that the Government would have ample opportunity "to convince the trial court that its proof had an independent origin" indicated that once the defendant made out a prima facie case showing tapping had been used to some extent and the evidence it had produced, the final burden rested on the government to refute this charge. It cited the analogy of the rule which in civil cases places on a wrongdoer who has commingled the consequences of lawful and unlawful conduct, the burden of disentangling them. It pointed out that it was appropriate for the prosecution to bear the burden since it possessed the knowledge of how the case was prepared.[149]

The second *Nardone* decision may not exercise the deterrent effect on federal officers that at first thought appeared probable. If the prosecution exposes the source of the evidence on trial by seeking to introduce the substance of intercepted messages, the way is opened for objection by the defendant. Where, however, the intercepted conversations are used before trial to secure other evidence, the accused will often be completely unaware that his wires have been tapped. Or if he is aware, it may be difficult for him to discover what portion of the government's case is traceable to the information thus secured in order to prove to the trial judge the parts which should be excluded. He will thus be unable to sustain the burden of making out a prima facie case which the second *Nardone* decision seems to impose.

to extraneous facts which can be independently confirmed, and there is no reason to exclude them. The exclusion of evidence derived from wire tapping rests on an entirely different principle causing the analogy to fail.

[148]120 F. (2d) 485 (C. C. A. 2d, 1941).

[149]The only other case discussing the requirements as to satisfying the burden of proof, laid down by the second *Nardone* decision was United States v. Pillon, 36 F. Supp. 567 (E. D. N. Y. 1941). The court there denied the defendant's motion for a hearing preliminary to trial in order to prove the use of wire tapping by government agents, which had been divulged, according to the defendant before the grand jury. The prosecution denied this charge. The court refused to inspect the minutes of the grand jury, to ascertain whether the defendant's charge was well founded. It stated however, that no right of the defendant was foreclosed by denial of the motion, for if it should appear on trial that evidence had been secured by wire tapping, it would be excluded.

United States v. Gruber, 39 F. Supp. 291 (S. D. N. Y. 1941) denied a motion to suppress the Government's evidence because there were no facts before the court to show that the Government had used, or intended to use, wire tapped information.

United States v. Bonanzi, 94 F. (2d) 570 (C. C. A. 2d, 1938) decided before the second *Nardone* case, held that, assuming § 605 did not apply to intrastate communications, the Government bore the burden of showing, at least prima facie, that the wire tapped conversations by which it obtained evidence, were part of interstate communications.

It is conceivable that an over-zealous prosecutor may rely extensively on wire tapping to lead him to proof which he may present at trial with impunity.

The second *Nardone* case establishes a shadowy area wherein it is difficult to distinguish the tainted "evidence from the untainted". If wire tapping uncovers the commission of a crime which can be proved beyond a reasonable doubt by independent evidence, does the method of its discovery preclude prosecution? If a witness is present at the scene of a crime because of information secured from intercepted telephone conversations, may he testify to what he saw? Is the testimony of a witness admissible if he was induced to testify by the Government's use of wire tapped information? These and similar questions were left to the fairness and good sense of the trial judge. On the last question, however, the Supreme Court has twice enunciated its views in the *Weiss* and *Goldstein* cases.

In *United States* v. *Weiss*,[150] the defendants were charged with conspiracy to use the mails to defraud insurance companies by inducing them to pay false claims. Evidence was secured by tapping the wires leading to the offices of two of the defendants over a period of months. This was done by a local police officer under instructions of a federal agent. Stenographic transcripts and phonograph records were made of the intercepted conversations. The wires tapped were conduits of both intrastate and interstate communications and calls of both classes were intercepted. One of the defendants became a government witness when confronted with the records of the intercepted calls. Others did likewise when informed of the interceptions. At the trial, evidence of the intercepted calls was introduced over the defendant's objection. The evidence was in the form of the stenographic and phonographic transcripts, identified as correct by one of the defendants who had been a party to the call, or in some cases by both defendants where both had been parties. The records introduced, with one possible exception, were of intrastate communications.

The Government defended the admissibility of the records of intercepted calls on the ground that the disclosure was authorized by the sender within the language of the second clause of Section 605, which permits disclosure on that condition. The Court held that any "consent" was nullified by two circumstances: (1) The witnesses were compelled to testify by the fact that the contents of the messages were known to the government; (2) The witnesses were induced to testify by payment of salary and also by grant of

[150]308 U. S. 321, 60 Sup. Ct. 269 (1939), *reversing* United States v. Weiss, 103 F. (2d) 348 (C. C. A. 2d, 1939).

certain favors. This was not the voluntary authorization of disclosure contemplated by the statute. The Court also referred to the disclosure which had already occurred when the records of the intercepted conversations were made available to the United States attorneys before trial. The opinion did not explain how this could affect the admissibility of the evidence on trial, although presumably the testimony of the witnesses, having been obtained by means of this unlawful act, would fall within the ban of the second *Nardone* decision relating to all derivative evidence.

The Government further contended that the title to the Federal Communications Act and express provisions in Sections 1 and 2 proved that it was enacted for the purpose of regulating only interstate and foreign communication. It was also urged that the Radio Act, on which the Communications Act was based, was limited in this respect, and that there was nothing to show that Congress intended an extension of the jurisdiction under the former Act. The defendants replied that the first and third clauses of Section 605, prohibiting disclosures by persons engaged in transmitting them, were specifically applicable to messages transmitted in interstate or foreign commerce, and that the absence of this qualifying phrase from the second and fourth clauses should be construed as extending them to interceptions of intrastate communications. The defense pointed out that the limitation as to the first and third clauses was explained by the fact that employees of communications companies could distinguish between intrastate and interstate calls, but that government agents in tapping a wire for an intrastate communication might overhear an interstate conversation and the protection afforded by the statute to such calls would thus be lost. The Court, preferring the defendant's line of reasoning, considered that the different wording in the sections one and three of Section 605 must have some meaning and that the stated limitation of the Act to interstate communications applied only to the Commission's regulatory powers and administrative functions without extending to the penal provisions of Section 605. While the opinion contrasts the wording of the first and third clauses with that of the second and fourth, it specifically states that the question in the case relates to the second clause. Its holding, therefore, extends only the second clause to intrastate communications. The fourth clause, which uses the words "such intercepted communications" seems to be limited to "any interstate or foreign communication by wire or radio" last mentioned in the third clause.

The *Weiss* case in deciding that Section 605 prohibited the interception and divulgence of intrastate conversations, resolved a conflict which had ex-

isted in the decisions of circuit courts. The third circuit and the sixth circuit had reached the same result on the basis of reasoning similar to that relied upon in the *Weiss* case.[151] The first circuit had held to the contrary.[152]

The holding in the *Weiss* case was the logical application of the policy announced in the second *Nardone* decision. It was intended further to curtail wire tapping by federal officers by preventing the introduction of evidence of intercepted intrastate communications and of conversations to which one of the parties was induced to testify after the interception occurred. A contrary holding as to intrastate messages would to a great extent have nullified the effect of the second *Nardone* decision, for it would have eliminated from the protection of its rule a large proportion of the number of telephone calls made. The opposite conclusion permitting a party to an intercepted call to testify to its contents would have invited wire tapping in the hope that one of the parties would later be persuaded to testify to the contents of the conversations.

The interpretation extending Section 605 to intrastate communications rested on the authority of Congress to regulate intrastate transactions in pursuance of its power to protect interstate commerce.[153] An intercepter cannot stop his ears to interstate messages and listen only to intrastate conversations. It is therefore necessary to prohibit the interception of both in order to protect the former. The only wire tapping constitutionally outside the scope of the *Weiss* decision is that on intra-office lines, which never carry interstate messages.

The *Weiss* decision would seem to make all state officers who participated in interception of intrastate messages vulnerable to prosecution under penal provisions of Section 501 of the Communications Act. The act of interception alone would probably be insufficient for indictment, since the conjunctive language of the second clause of Section 605 forbidding any unauthorized person to "intercept any communication and divulge or publish" the contents indicates that wire tapping if not followed by divulgence is not prohibited.[154]

[151]Sablowsky v. United States, 101 F. (2d) 183 (C. C. A. 3d, 1938); United States v. Klee, 101 F. (2d) 191 (C. C. A. 3d, 1938); Diamond v. United States, 108 F. (2d) 859 (C. C. A. 6th, 1938). In United States v. Plisco, 22 F. Supp. 242 (D. C. D. C. 1938), the District Court of the District of Columbia had held the evidence of intercepted local messages passing within the District should be suppressed on preliminary motion as being prohibited by the same policy as dictated the decision in the first *Nardone* case.

[152]Valli v. United States, 94 F. (2d) 687 (C. C. A. 1st, 1938) *cert. granted* 303 U. S. 632, 58 Sup. Ct. 760 (1938) *dismissed on motion of counsel for petitioners,* 304 U. S. 586, 58 Sup. Ct. 1053 (1938).

[153]Houston, East and West Texas Railway Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1914).

[154]Notes (1940) 34 ILL. L. REV. 758, n. 15; (1940) 30 J. CRIM. L. 945, 947.

An officer who intercepts, however, almost invariably divulges the information he has secured to a superior or other officer, thus bringing himself within the scope of Section 605.[155] Although the federal authorities might be reluctant to prosecute, a state officer tapping wires under state statute sanctioning this practice thus places himself in the anomalous position of enforcing a state law and thereby violating a federal law.

For a time it appeared that the *Weiss* case had put an end to the use of intercepted conversations to compel the parties overheard to become Government witnesses. This belief was short-lived, however. In another trial of some of the participants in the same conspiracy involved in the *Weiss* case, the Government again presented the testimony of two of the conspirators who had been induced to testify for the Government when confronted with intercepted conversations. This time the evidence was held receivable. The witnesses were parties to some of these messages, but the defendants were not. The testimony did not include any reference to the intercepted messages. The Circuit Court for the Second Circuit held in *United States* v. *Goldstein*,[156] as already noted in discussion of the second *Nardone* case, that the final burden of proving that the evidence was not traceable to wire tapping rested on the prosecution and that this burden had not been sustained. It affirmed the convictions, however, for the reason that the defendant, not being a party to the intercepted conversations, had no right under Section 605 to object to their unlawful use,[157] and for the added reason that although the prosecution had already divulged the information secured by wire tapping to the witnesses, the indirect use of that information by offering the testimony of those witnesses was not forbidden by the statute.

The Supreme Court, affirming, by a five to three decision,[158] considered that a decision as to which party bore the burden of proof was unnecessary. The reasoning of the court below to the effect that defendant, who was not a party to the tapped conversations, could not object to their use by the prosecution was approved. The Court pointed out the well settled law that, even in the jurisdictions following the Federal rule of exclusion, one not a victim of an illegal seizure will not be heard to protest against admission of the

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[155]If the "divulgence" takes the form of testimony in a state court, the question arises whether Congress intended § 605 to regulate the admissibility of evidence in state courts and if so, whether it was constitutionally authorized to pass such a regulation. This question is discussed *infra* Part IV.

[156]120 F. (2d) 485 (C. C. A. 2d, 1941).

[157]The Second Circuit had held to the same effect in United States v. Seeman, 115 F. (2d) 371 (C. C. A. 2d, 1940).

[158]Goldstein v. United States, 316 U. S. 114, 62 Sup. Ct. 1000 (1942).

evidence secured in violation of the Fourth Amendment.[159] It was of the opinion that no broader sanction should be applied to the Communications Act than to the Constitution. The Court also agreed with the lower court in holding that since by the terms of the statute, the sender might authorize divulgence of a message, he was the only one entitled to protection thereunder.

The line of reasoning just stated was an interpretation of the second clause of Section 605 forbidding any person not authorized by the sender to intercept and divulge a telephone or telegraph message. The Court also discussed the purport of the fourth clause which forbids the use of an unlawfully intercepted message or any information therein contained by any person for his own benefit or the benefit of another not entitled thereto. This had apparently been overlooked by the circuit court. The prosecution contended that this clause was not applicable to use of intercepted messages by the Government, but was intended to prevent their use for the advantage of a private individual. The Court did not decide this point. It held that, assuming that the Government had been guilty of a violation of Section 605 in inducing the parties to the intercepted conversation to testify, this would not "render the testimony so procured inadmissible against a person not a party to the message." It did not elaborate on this point, except to remark that it was "the settled common law rule" and in support thereof it cited that part of the *Olmstead* opinion which refers to the Washington wire tapping statute violated by the federal officers in securing evidence for the prosecution in that case and which holds that evidence is not rendered inadmissible by the illegal manner of its obtention, short of an infringement of a Constitutional guarantee. The Supreme Court called attention to the penalties imposed by Section 501 of the Communications Act in case Government officers had been guilty of an infraction of Section 605.

Mr. Justice Murphy writing the dissenting opinion, in which Chief Justice Stone and Mr. Justice Frankfurter concurred, stated that the second *Nardone* case was controlling, since that case like this one, involved evidence not of the messages themselves, but of other facts to which illegal wire tapping had led. The dissent contended that the fact that defendants were not parties to the intercepted messages should not bring about a different result, and that it was a nonsequitur to conclude that because only a party to a conversation may authorize its divulgence, he alone may object

[159]The numerous cases holding evidence admissible under these circumstances are collected in Notes (1944) 150 A. L. R. 577, (1941) 134 A. L. R. 831, (1934) A. L. R. 365.

to its illegal interception. The emphasis of the opinion, however, is placed not on an interpretation of the language of Section 605, but rather on the policy against wire tapping supposedly underlying the enactment of that section and its interpretation in previous cases by the Supreme Court. This policy, it was stated, would be defeated or substantially impaired under the holding of the majority. The dissent considered, in fact, that "the opinion of the Court that evidence obtained in violation of Section 605 is not rendered inadmissible because Section 501 of the Act provides specific sanctions for violations of Section 605, is a direct repudiation of both *Nardone* cases and the *Weiss* case" where "evidence secured by violation of Section 605 was declared to be inadmissible, despite the existence of Section 501".[160] The series of decisions in the Supreme Court beginning with the *Weeks* case rejecting evidence which had been "procured in violation of federal law by agents of the Government" established a principle which, it was implied, should be followed in application of Section 605.

A comparison of the diverse results in the *Goldstein* and the second *Nardone* case compels the conclusion that the Supreme Court in the interim between the two had modified its attitude towards the use of wire tapping by government agents. The dissent correctly pointed out that the only distinction between the two cases was that the defendant, the objecting party, was a participant in the intercepted conversations in the one instance and not in the other. Both cases concerned the admissibility of evidence secured through a violation of Section 605, but not of the contents of the intercepted conversations. Neither raised the question whether the Court should permit a violation of the statute at the trial by allowing "divulgence" at that time; the divulgence or illegal use had occurred beforehand. On the admissibility of evidence secured by divulgence before trial the statute was silent. The interpretation was dictated not by the terms of the act but purely by considerations of policy. If the Supreme Court had been consistent in its announced policy of discouraging wire tapping by limiting the uses to which it could be put, it would have reached the same conclusion in the *Goldstein* case as in the second *Nardone* case.

The second reason adduced by the majority for its decision, that the illegal use of intercepted communications by government officers did not invalidate the evidence so secured, raises a query concerning the result in a case in which the Government witness was induced to testify by information gained

[160] 316 U. S. 114, 128, 62 Sup. Ct. 1000, 1007 (1942).

by official interception of messages to which the defendant was a party. The opinion stated that evidence indirectly procured by a violation of Section 605 is admissible "against a person not a party to the message". From its reference to the *Olmstead* decision, it is clear that it intended to invoke the common law rule, consistently followed by the Supreme Court when no constitutional right is at issue, that a court will not take notice of the manner in which evidence is obtained. But this rule is applicable and is more frequently involved when the objecting party is the victim of the illegal act. This part of the majority opinion therefore, despite its qualification concerning the beneficiary of the rule, lays the groundwork for a decision admitting the evidence of a person who became state's witness through use of wire tapped conversations to which the defendant was a party. Such a decision would not conflict with the holding in the *Weiss* case in which the Government offered in evidence testimony concerning the *substance* of the intercepted messages, divulgence of which would have constituted a crime at the trial.

The use of wire tapped information to secure the testimony of a witness is only one of the avenues opened to enforcement officers by the decision of the Supreme Court in the *Goldstein* case reaffirming the ancient common law rule of admission of evidence regardless of its source. If pursued to its logical conclusion, this reasoning would permit the use of wire tapping in many ways which the second *Nardone* decision had seemed to foreclose. It would, in fact, permit introduction of any evidence secured by the use of wire tapped information before trial.

It seems unlikely that the Supreme Court will ever go farther and relax its interpretation of Section 605 to such an extent that it will permit reception of direct evidence of wire tapped conversations, although its reasoning in the *Goldstein* case that one, not a party to the intercepted conversations has no right to object to their use might be applied to such circumstances with equal cogency. Testifying to the contents of a tapped conversation is a crime, however, under the prohibition against divulgence in Section 605. A court would probably refuse to sanction such an act in its presence even though objection should be raised by one not a party to the intercepted conversations. It seems, therefore, that if the Supreme Court adheres to its reasoning in the *Goldstein* case, the line between admissibility and inadmissibility of evidence secured in violation of Section 605 may be drawn according to the time of occurrence of the illegal act. If before trial, it may be ignored, but divulgence at the trial will be forbidden.

The *Goldstein* case was the first to focus attention on the fourth clause, the "forbidden use" clause of Section 605. It did not settle the dispute between the parties as to whether this prohibition was applicable to federal officers. There is no more reason to suppose that it would be held inapplicable than the second clause, which was held to forbid official interception and divulgence in the first *Nardone* case. The question may be of little practical importance, however, if the Supreme Court adheres to its reasoning in the *Goldstein* case. If the admissibility of evidence is in issue, it is immaterial, according to the *Goldstein* case, that a crime has been committed by "use" of intercepted information. In prosecution for violation of Section 605, an offender who "used" the information could almost invariably be indicted for a "divulgence," which is clearly a violation.

Another question involving the interpretation of Section 605 not discussed in any of the opinions of the Supreme Court arises out of a favorite method employed by the police in securing evidence of crime. The facts in the cases deciding this question differ from those in the *Weiss* case, only in that the Government witnesses who testified to the intercepted conversations were collaborating with federal agents at the time the interceptions occurred. The case most typical and most enlightening in the exposition of the arguments is *United States* v. *Polakoff*.[161] This was an appeal from a conviction for conspiring to obstruct justice by securing a lighter sentence for one *K*, who was under indictment on a narcotics charge. *K* voluntarily informed the Federal Bureau of Investigation of the plot. Through a telephone in the offices of the Bureau, *K* conversed with each of the accused, who made statements sufficiently damaging to support a conviction. The conversations were recorded upon a machine annexed to an extension in the same circuit as the telephone *K* was using. The principal question was the competency of accused's declarations over the telephone. The Government urged the admissibility of the evidence on the grounds that *K* as the "sender" of the message within the meaning of Section 605, had consented to its divulgence, and that in any event, the recording of the conversation was not an "interception". The court, by Judge Learned Hand, rejected both arguments. In reply to the first, it held that in a telephone conversation, each party is alternately sender and receiver; that it would be "extremely unreal" to hold that each party had the power to consent to the interception of so much as he said,

[161]112 F. (2d) 888 (C. C. A. 2d, 1940). United States v. Fallon, 112 F. (2d) 894 (C. C. A. 2d, 1940) was a *per curiam* opinion handed down on the same day and involving similar facts.

for "in the interchange each answer may, and often does, imply by reference some part of that to which it responds"; and that therefore both parties must consent to the interception of any portion of the conversation. *K's* consent to the interception was accordingly held insufficient. The court further ruled that the recording, even though made at an extension and not by "tapping" a wire was an interception, for it violated the purpose of the statute, which was to prevent breaches of the right of privacy. Judge Augustus Hand wrote a concurring opinion to the effect that the case before the court was governed by the *Nardone* cases and the *Weiss* case, but expressed the belief that the prohibition against wire tapping to detect criminal activities imposes "great and at times insurmountable obstacles upon the prosecuting authorities in the detection and prosecution of crime". He also stated that he saw no "fundamental difference between evidence obtained in this way and by many other methods of detection, which I suppose to be permissible, except for the scope given to the provisions of the Federal Communications Act".

Judge Clark dissenting, believed that the majority took "a long step beyond previous interdictions of the use of telephonic communications as legal evidence" in holding that even one party to the tapped conversation who might wish to make use of it could not legally do so. He believed that a party to a telephone conversation considered that he placed it within the power of the other party to make use of any part of the conversation. He cited in support of his contention the clause of Section 605 reading: "No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." This clearly implied, he thought, that a person entitled to receive the communication might himself use it. He discussed the practical consequences of the majority ruling. It must follow from that ruling that the record of the intercepted conversations would be inadmissible, that the testimony of the agents who might also listen in would be objectionable. Thus the only competent evidence of the conversations would be the testimony of the party himself. This would rule out the most trustworthy evidence, the accurate record by the machine, and compel reliance on the memory of the party, who might also, if formerly associated in crime with the defendant, find it to his advantage to falsify some part of the conversations. Moreover, the majority ruling would mean that criminals by taking the precaution of communicating with each other by telephone would lessen

the risk that one of their number could effectively betray them to the police. Lastly, a party to a telephone conversation could not permit his secretary to overhear and transcribe a conversation in which he might be threatened or in which blackmail might be attempted, for both would be guilty of a criminal offense under Section 605.

The *Polakoff* case had been preceded by a district court decision[162] which also involved a recording over a telephone extension of a conversation between an informer and the accused. The court rejected the latter's claim that reception of the record in evidence was error under Section 605. It held that the call was not "intercepted" within the meaning of the Statute, but was merely recorded at one end of the line by one of the participants, differing only in method from a transcription of a telephone conversation made by a participant. The court did not discuss the question of the significance of the consent of the one party to the call. The majority opinion in the *Polakoff* case cited this case but expressly disagreed with the result.

The Second Circuit Court in the *Polakoff* case did not cite *United States* v. *Bruno*[163] in which it had previously held that admission in evidence of a conversation between defendant and a conspirator made in the circuit from which the latter was speaking, even if an error, would not warrant a reversal inasmuch as a government agent, posing as a buyer of narcotics, was present when the conspirator used the telephone and his testimony that the conversations took place would have supported the conviction without corroboration by the recording. The court assumed in that case that the testimony of the person overhearing the one end of the conversation was admissible, and since he was not an intercepter nor an eavesdropper, there is no reason to suppose this to be incorrect. In the *Polakoff* case, the majority did not discuss the admissibility of testimony by the agents; it appeared, however, from the reference in the dissenting opinion, that they listened in on the extension to both ends of the conversation, so that their testimony as intercepters was inadmissible either independently of the records or in corroboration of them.

Another variation in methods of securing evidence by telephone was illustrated in a series of California cases involving convictions for violations of the gambling laws. The facts in all were substantially the same. The decision and reasoning adopted by the Supreme Court of California in *People* v. *Kelley*[164] was followed in the others.[165] The *Kelley* case, though decided

[162]United States v. Yee Ping Jong, 26 F. Supp. 69 (W. D. Pa. 1939).
[163]105 F. (2d) 921 (C. C. A. 2d, 1939).
[164]22 Cal. (2d) 169, 137 P. (2d) 1 (1943) *aff'g.* 122 P. (2d) 655 (Cal. App. 2d Dist. 1942) *appeal dismissed* 320 U. S. 715, 64 Sup. Ct. 264 (1943), *rehearing denied* 321 U. S. 802, 64 Sup. Ct. 527 (1944).

in a state court, was an interpretation of Section 605 of the Federal Communications Act.[166] The defendant therein assigned as error the admission in the lower court of the testimony of police officers to the contents of telephone messages which they heard when they raided defendant's apartment and answered the telephone. The court, assuming without discussion that Section 605 governed, held that the accused, never having been a party to the conversations, was not a "sender", even within the broad interpretation of the meaning of that term accorded it by *United States* v. *Polakoff*. Not being a sender, he was not entitled to the protection of the Act under the decision of the Supreme Court in the *Goldstein* case. A vigorous dissenting opinion, on behalf of two judges, stated that the third clause of Section 605 was applicable—"and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto." The dissent referred to the *Weiss* case as holding all clauses of Section 605 applicable to intrastate communications, thus eliminating any objection to its application here.[167] In the alternative, the first clause prohibiting interception and divulgence would effectively bar the admission of the testimony in question, according to the minority. It interpreted the *Goldstein* case as holding that one not a *party* had no right to object to divulgence of the intercepted conversations, and it considered defendant a party inasmuch as the messages were intended for him. The dissenting opinion further expressed the view that the messages never having completed their intended course were "intercepted" within the meaning of Section 605.[168]

"Interception" as used in Section 605 was the subject of further interpretation by the Supreme Court in *Goldman* v. *United States*.[169] The defendants were convicted of conspiracy to violate the Bankruptcy Act. Federal

[165]People v. Vertlieb, 22 Cal. (2d) 193, 137 P. (2d) 437 (1943); People v. Onofrio, 65 Cal. App. (2d) 584, 151 P. (2d) 158 (1944); People v. Barnhart, 66 Cal. App. (2d) 714, 153 P. (2d) 214 (1944).

[166]Whether § 605 controls admission of evidence in state courts will be discussed *infra* Part IV.

[167]That this view is mistaken has already been pointed out in discussion of the *Weiss* case.

[168]If exclusion of the evidence in the *Kelley* case seemed desirable under the policy of § 605, a more forceful dissent might have reasoned from the premise that an unlawful interception occurred as stated by the minority and that in allowing testimony of the contents of the intercepted messages, the court permitted a "divulgence" within the meaning of the second clause of § 605. That is, it sanctioned the commission of a crime in its presence.

[169]316 U. S. 129, 62 Sup. Ct. 993 (1942), *aff'g.* United States v. Goldman, 118 F. (2d) 310 (C. C. A. 2d, 1941).

agents obtained knowledge of the scheme on the disclosure of one of the conspirators. With the assistance of the building superintendent, they obtained access at night to the office of one of the defendants and installed a listening apparatus to enable them to overhear from the adjoining room. When this apparatus did not work, the agents working in this adjoining room, placed against the partition a hearing device called a detectaphone, which amplified sounds in the defendant's office. By means of this device, they overheard conferences in furtherance of the scheme and also heard what the defendant said when speaking over the telephone in his office. It was to the reception of the latter portion of the evidence that defendant objected as a violation of Section 605. The Supreme Court held by a five to three decision, that the evidence was properly received. It decided that both "wire communication" and "intercept" indicated that the Act was intended to protect the message in the course of its transmission and not before or at the moment it left the proposed sender or after or at the moment it came into the possession of the intended receiver. Overhearing the words the defendant spoke into the telephone receiver was not within the terms of the Communications Act to any greater extent than overhearing a conversation by one sitting in the same room. The Court further ruled that the trespass of which the agents were guilty in installing the first apparatus had no causal relation with the listening over the detectaphone and therefore did not affect the legal consequences. Finally the Court denied the defendant's contention that since a person talking, as in this case, in his own office did not intend his voice to project beyond four walls and did not take the risk of an amplifying device nearby, the use of the detectaphone was a violation of the right of privacy guaranteed by the Fourth Amendment. The Court could see no great distinction between wire tapping and listening through a detectaphone. It expressly refused to overrule the *Olmstead* case, as well as to distinguish it.

Chief Justice Stone and Mr. Justice Frankfurter stated their readiness to overrule the *Olmstead* case, but since the majority declined to do this, they based their dissents on the dissenting opinions in that case. Mr. Justice Murphy dissented in the belief that the use of the detectaphone under the circumstances of this case was an unreasonable search and seizure. He considered the *Olmstead* decision wrong, but thought that even if it should remain the law, it did not govern the present case. Wire tapping is a device usually employed outside the home, but the application of a detectaphone to the walls of a room "constitutes a direct invasion of the privacy of the

occupant and a search of his private quarters". The opinion discusses at some length the need for expanding the range of the Fourth Amendment in harmony with the innovation of scientific devices adaptable to invasion of the privacy of the individual and concludes that its purpose should not be thwarted by too literal an interpretation.

Aside from the question raised by the *Goldman* decision under the Fourth Amendment, it was clearly correct in holding that eavesdropping by federal agents to one end of a telephone conversation did not constitute an "interception" within the meaning of Section 605. Whatever other protection should be afforded by the law against an act of this kind, the policy underlying the adoption and interpretation of this statute does not extend so far. The same is probably true of the facts presented by the *Polakoff* and *Kelley* cases as well. While in those cases government agents secured evidence of the messages as or before they reached their intended hearers, wire tapping in its most insidious form, the secret eavesdropping on a conversation of which both parties are ignorant and against which they are helpless to protect themselves, was not an element. Congress did not intend to cut off all resort by federal agents to trickery, spying, posing, and eavesdropping in the detection of crime. These are methods which have long been accepted as necessary weapons in the law enforcement arsenal. Only where the means used threatened a serious invasion of privacy, did this become the overmastering consideration necessitating prohibitive legislation. The methods used to secure evidence in the *Polakoff, Kelley* and *Goldman* cases were essentially those (except possibly the amplifying device in the last) which would not have been questioned in a federal court without the incidental use of the telephone. In the *Polakoff* case the transcription of the conversation between the defendant and the informer might have been effected secretly if they had spoken to one another in person; in the *Kelley* case, the police, by concealing their identity from the other party to the conversation, took messages intended for another, but this action was a far cry from the clandestine tapping of wires; in the *Goldman* case, the evidence was obtained by eavesdropping. Betrayal, deceit, and eavesdropping were not grounds for exclusion of the evidence secured by these methods. The fact that the telephone was incidentally involved did not bring them within the scope of Section 605.

The extent to which wire tapping is used by federal officers in the scope of their duties is revealed by the facts in the cases decided under Section 605. It is significant that all those cases thus far discussed arose on an objection

to admissibility of evidence obtained in violation of the provisions of that section. The same acts which gave rise to these objections were usually crimes, however, subject to penalties provided in Section 501 of the Act. Yet the cases of prosecutions of the officers committing these crimes are noteworthy for their scarcity. Only one case is reported of a prosecution under Section 605, and the defendants there were private individuals.[170] They were charged with conspiracy to violate the wire tapping sections of the Communications Act. The appeal involved only the principal conspirator, a lawyer, who had induced a telephone operator in the office of the Securities and Exchange Commission to connect his office telephone by means of "the conference system" with calls from a Commission employee in Chicago to his superior in New York. The operator twice connected him with such conversations. It was contended for the defendant that although the operator intercepted the messages she could not have divulged them because she never heard the conversations. The Court held, however, that transmission to a third party without consent of the sender was an interception and divulgence even though the intercepter had no knowledge of the conversations. The Court apparently assumed that interception followed by divulgence was necessary for a violation; at least it did not make the obvious response to the defendant's contention, if interception was sufficient to make out a crime, that it was unnecessary to rule on the meaning of "divulgence".

Mention of two other Supreme Court cases has been reserved for the conclusion of this part of the study relating to federal law, for while they do not deal with wire tapping, they introduce a revolutionary theory which, if adhered to, may vitally affect the law of admissibility of evidence in the federal courts, including the admissibility of evidence secured by wire tapping. The cases referred to are *McNabb* v. *United States*[171] and its companion case *Anderson* v. *United States*.[172] Both held that failure of arresting officers to take defendants before a committing magistrate as required by statute rendered inadmissible the confessions obtained while they were confined for questioning. The opinions clearly exclude any possibility that they are based on the self-incrimination clause of the Fifth Amendment or on the consideration that the confessions were involuntary and therefore untrustworthy. While they contain no reference to the common law rule ad-

[170]United States v. Gruber, 39 F. Supp. 291 (S. D. N. Y. 1941) (motion to quash indictment and suppress evidence denied); 123 F. (2d) 307 (C. C. A. 2d, 1941) (appeal from conviction).

[171]318 U. S. 332, 63 Sup. Ct. 608 (1943).

[172]318 U. S. 350, 63 Sup. Ct. 599 (1943).

mitting relevant evidence regardless of the manner of its obtention, the theory adopted is that disregard of the procedural requirement of the statute is sufficient to exclude the confessions. In the *McNabb* case the Court said: "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone* v. *United States,* 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."[173] Mr. Justice Reed, dissenting, stated his opposition to "this new rule of evidence" because it would broaden "the possibilities of defendants escaping punishment by these more rigorous technical requirements in the administration of justice". Thus the lines were drawn as in every other phase of the controversy, the proponents of the strict regard for personal rights against those more concerned for the enforcement of the criminal law.

The statute which was violated in the *McNabb* case was a federal statute, and in the *Anderson* case a state statute. The Court therefore declared a policy directly opposite to the one which guided it a year earlier in the decisions of the *Goldstein* case and which it must have approved in the express reaffirmance of the *Olmstead* case in *Goldman* v. *United States.* The *Goldstein* case, it will be remembered, held that evidence secured indirectly through the use of wire tapping before trial, even though this constituted a violation of a federal statute, was nevertheless admissible under the common law rule that the court would ignore the manner of obtention of the evidence. The *Olmstead* case held that violation of a Washington wire tapping statute by federal officers in securing evidence for a criminal case did not render the evidence inadmissible on trial. The decisions of the Supreme Court had never deviated from the common law rule except in those cases where the illegal act was a violation of a Constitutional guaranty or admission prohibited by statute. The doctrine of the *McNabb* and *Anderson* cases, therefore, represents a distinct departure from the previous rule and a conversion to the views set forth by Mr. Justice Holmes and Mr. Justice Brandeis in the dissenting opinions of the *Burdeau* and *Olmstead* cases. In the law of wire tapping, the *McNabb* and *Anderson* decisions will, if the court is consistent, have two consequences: (1) The doctrine of the second *Nardone* case, which seemed for a time to be shaken by the reasoning in the *Goldstein*

[173]318 U. S. 332, 341, 63 Sup. Ct. 608, 613 (1943).

case, will be reinstated, removing any doubt that evidence secured by the use or divulgence of wire tapped information before trial is inadmissible in a federal court; (2) Evidence secured by federal officers in violation of a state statute prohibiting wire tapping or use of wire tapped information will be inadmissible in a federal court whether their acts do or do not fall within the prohibition of Section 605.