University of Miami Law Review

Volume 14 | Number 1 | Article 6

10-1-1959

The Admissibility of Wiretap Evidence in the Federal Courts

Robert Price

Follow this and additional works at: https://repository.law.miami.edu/umlr

Part of the Law Commons

Recommended Citation
Robert Price, *The Admissibility of Wiretap Evidence in the Federal Courts*, 14 U. Miami L. Rev. 57 (1959)
Available at: https://repository.law.miami.edu/umlr/vol14/iss1/6

This Leading Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE ADMISSIBILITY OF WIRETAP EVIDENCE IN THE FEDERAL COURTS

ROBERT PRICE*

In a society where the individual is increasingly subjected to invasions of his privacy by governmental units, the Supreme Court recently struck a blow for freedom. The vehicle for this was the decision in *Benanti v. United States*[1] where a unanimous Court rounded out the areas of exclusion for wiretap evidence and finally laid to rest the use of any post-1934 wiretaps as sources of evidence in our federal courts.[2] In so doing, the federal judiciary continued its role as protector of the right of privacy of the individual.

The exclusion of wiretap evidence by our federal courts is in complete harmony with the federal rule of inadmissibility of illegally obtained evidence. This federal rule differs from the common law where it has long been the majority rule that the admissibility of evidence is not affected by the illegality of the means through which the party has obtained the evidence.[3]

This common law doctrine of admissibility was virtually unchallenged in our jurisprudence until the opinions of the United States Supreme

*LL.B. 1958, Columbia University; Assistant United States Attorney for the Southern District of New York; Member of New York and Federal Bar. The author is indebted to Robert Paul, Esq. of Miami for his helpful suggestions.

1. 355 U.S. 96 (1957).
2. For related studies of this problem, see Bradley & Hogan, *Wire tapping: From Nardone to Benanti and Rathbun*, 46 GEO. L.J. 418 (1958); Wickershaw, *The Supreme Court and Federal Criminal Procedure*, 44 CORNELL L.Q. 14 (1958); W. P. Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954); Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 YALE L.J. 799 (1954); Pogue, *Wire Tapping and The Congress*, 52 MICH. L. REV. 430 (1954); Westin, *The Wire Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952); Note, *Exclusion of Evidence Obtained by Wire Tapping: An Illusory Safeguard*, 61 YALE L.J. 1221 (1952); Note, *The Coplon Case: Wire tapping, State Secrets and National Security*, 60 YALE L.J. 736 (1951); Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514 (1947); 8 WIGMORE, EVIDENCE § 2184b (3d ed. 1940). See also 97 L.Ed 237 (1952) for a collection of federal cases; *House Judiciary Committee Hearings* on H.R.REP. No. 2266 and H.R. REP. No. 3099, *to authorize wire-tapping*, 77th Cong. 1st Sess. (1941); Fairfield & Clift, *The Wiretappers*, The Reporter, Dec. 23, 1952, p. 8; Jan. 6, 1953, p. 9. For a compilation of leading works in this area, see The Record, Association of the Bar of the City of New York, Vol. XIII, No. 3, pp. 172-5 (March, 1958).
3. *Common Law*: Adams v. New York, 192 U.S. 585 48 L.Ed. 575 (1904); Williams v. State, 100 Ga. 511, 28 S.E. 624 (1897). *Alabama*: Jackson v. State, 251 Ala. 226, 36 So.2d (1948). *California*: People v. Kiss, 125 Cal. App.2d 138, 269 P.2d 924 (1954). *Idaho*: State v. Bond, 12 Ida. 424, 86 Pac. 43 (1906). *Illinois*: Chicago v. Di Salvo, 302 Ill. 85, 134 N.E. 5 (1922). *Louisiana*: State v. Martinez, 220 La. 899, 57 So.2d 888 (1952). *Minnesota*: State v. Siporen, 215 Minn. 438, 10 N.W.2d 353 (1943). *New York*: People v. Richter's Jewelers, 291 N.Y. 161, 51 N.E.2d 69 (1943). *Pennsylvania*: Commonwealth v. Agoston, 364 Pa. 464, 72 A.2d 575 (1950).

Court in *Boyd v. United States*[4] and *Weeks v. United States*.[5] These decisions held that the fourth amendment to the Constitution which prohibited unreasonable search and seizure required adherence so deep and reverent that any approach to violation of the fourth amendment would not be approved by the federal courts. Admittedly the rule that evidence wrongfully obtained may not be used for any purpose is an extraordinary sanction. However, it is judicially imposed to limit searches and seizures to those conducted in strict compliance with the fourth amendment.[6]

Subsequent to these decisions and in consequence of this broad view taken by the Supreme Court, the problem arose as to whether the interception of a telephone message, by mechanical or other means,[7] with or without a warrant for search, was also a violation of the fourth amendment.

This issue was resolved by the United States Supreme Court in *Olmstead v. United States*.[8] In this case a divided Court held admissible evidence obtained by federal officers through the tapping of telephone wires. The basis of the decision was that as there was no entry on to the premises, but rather highway wires were tapped, there was no search or seizure and, hence, wire tapping did not fall within the prohibitions of the fourth amendment. The Court indicated that the fourth amendment

---

4. 116 U.S. 616 (1886).
5. 232 U.S. 383 (1914).
6. United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949).
7. The methods for tapping a wire are of substantial interest. Simply tapping a wire is a comparatively easy job for any electrician familiar with telephones. Normally, any repair man cuts in with his headphones regularly as part of his job. Attaching a recording device is only a little more complex. But to make a secret tap, such as we are talking about, requires a knowledge of the anatomy of the telephone system, plus certain confidential information about the particular phone to be tapped.

In a rural area this anatomy is very simple, on open poles quite exposed to trespassers. In rural areas also, where party lines are still used, anyone talking on a telephone is aware that some neighbor may be listening. It is in the big cities, where big telephone cables run underground, that we have developed the concept of telephone privacy. Yet it requires only a few facts to understand the vulnerability of this complex metropolitan system.

Each telephone has its own pair of electrical conductors, which is connected to a cable containing many such pairs. This connection is made at a junction box, known as a feeder box or bridging point, in which each pair is attached to exposed terminals, identified by number. Each cable has several of these bridging points. They vary from large panels in office buildings to relatively small boxes attached to walls in back yards. Few of these are locked and they are readily accessible for tampering by the man who knows what it is about.

To tap a phone in a big city, the tapper needs to know the *pair and cable* numbers for that phone, and the location of the cable's various bridging points. He can tap at any bridging point, or he may merely make a cross-connection to another, unused pair in another cable. Then, at some bridging point of this unused pair, he can attach his tapping wires at a place where they may be easily run to a secret "plant," in which the earphones or recording machine can be set up for monitoring all calls on the tapped telephone. *State of New York, Report of the New York State Joint Legislative Committee to Study Illegal Interception of Communications,* p. 20 (Legislative Document No. 53, 1956).

8. 277 U.S. 438 (1928).

appeared to be concerned only where the search was of material things — the person, the house, his papers, or his effects.[9]

In the case of wiretapping there is no searching and no seizure. Evidence is obtained only by the use of the sense of hearing and that alone. The Court reasoned that the intervening wires were not part of the house any more than are the highways along which they are situated. The Court stated:

> Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing a large and unusual meaning to the Fourth Amendment.[10]

Thus, up until the time that Congress acted in 1934, the legal status of wiretapping was easily defined: it was neither unconstitutional nor a federal crime and evidence obtained by intercepting telephone conversations was admissible[11] in federal courts.[12]

Evidently public disapproval greeted this opinion of the Supreme Court because from 1928 to 1934 several bills were introduced into the Congress.[13] Finally in 1934, Congress enacted The Communications Act of 1934,[14] particularly section 605, which reads in part:

---

9. This limitation of the fourth amendment is apparently still good law today. See United States v. Sugden, 226 F.2d 281 (9th Cir. 1955), *aff'd per curiam*, 351 U.S. 916 (1956); United States v. Silverman, 166 F. Supp. 838 (D.D.C. 1958).

10. 277 U.S. at 465-6.

11. This doctrine was followed in Foley v. United States, 64 F.2d 1, 4 (5th Cir. 1933), where the court stated: "[I]t is settled . . . that (wiretapping) . . . does not require the discarding of the information secured."

12. Bushouse v. United States, 67 F.2d 843 (6th Cir. 1933); Kerns v. United States, 50 F.2d 602 (6th Cir. 1931).

13. Three years before the enactment of § 605, Congress had failed to pass several bills forbidding wiretapping and excluding from federal courts evidence obtained thereby. H.R. REP. No. 23, H.R. REP. No. 5305, S. REP. No. 1396, 72d Cong., 1st Sess. (1931); H.R. REP. No. 9893, 72d Cong., 1st Sess. (1932). In 1933 an appropriations bill provided that none of the funds thereby appropriated should be used for wiretapping to procure evidence of violation of the National Prohibition Act. 47 Stat. 1381 (1933).

It seems unlikely that only one year later a bill known to affect so controversial a subject could pass without comment. Possibly, therefore, Congress passed § 605 without intending it to apply to telephone communications. However, the words, "communication by wire," as used in other sections, appear to include telephone communication. Thus, the plain meaning of the statute appears to require application of its prohibition to private wiretapping. However, in view of the established canon that a general statute need not be construed to bind the government, it would seem to have been unnecessary to apply the section to governmental wiretapping. But the courts have so done. Note, *The Benanti Case: State Wiretap Evidence and The Federal Exclusionary Rule*, 57 COLUM. L. REV. 1159 (1957).

14. 48 STAT. 1103 (1934), as amended, 47 U.S.C. § 605 (Supp. 1958). "While the legislative history of § 605 is obscure, it would be unrealistic not to recognize that one of its prime purposes was to overcome the force of the Olmstead case. . . ." United States v. Hill, 149 F.Supp. 83, 85 (S.D.N.Y. 1957). For a discussion upholding the constitutionality of this section see Massengale v. United States, 240 F.2d 781 (6th Cir.), *cert. denied*, 354 U.S. 909 (1957).

> [N]o 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. . . .

This act made wiretapping a criminal offense.[15]

An important distinction should be mentioned here. This act does not destroy the use of wiretap evidence in the federal courts. It simply makes wiretapping a crime.[16] The courts, by way of enforcing this statute, refuse to allow the fruits of this crime, namely wiretap evidence, to be used in the federal courts. Hence, were wiretapping not a crime the evidence probably could be used. Therefore, any evidence obtained by the use of wiretaps, before wiretapping became a federal crime, is admissible as evidence in the federal courts. This proposition is illustrated *infra*.

Soon after the enactment of the act the Supreme Court had an opportunity to interpret section 605. In *Nardone v. United States*,[17] the indictment charged the defendants with smuggling alcohol in violation of the Anti-Smuggling Act. They were tried, convicted and sentenced. Over the defendants' objections, federal agents testified to the substance of petitioners' interstate communications. The agents had overheard these conversations when they intercepted the messages by tapping telephone wires. The appellate court had sustained the conviction, and on appeal the Supreme Court reversed.

The Supreme Court held that evidence secured by federal officers in violation of this statute was inadmissible in federal courts. The Court apparently was not bothered by the lack of any apparent congressional intent in section 605 to formulate an evidentiary rule. Mr. Justice Roberts expressed his belief that the act prevented intercepting telephone conversation. He apparently saw no reason to permit evidence obtained by this criminal act to be admitted in federal court. The *Nardone* decision referred to the *Olmstead*[18] case and implied that section 605 was meant to correct a situation which Congress felt should not exist. Justice Roberts said the statute forbade any interception, and this included interception by government agents.

---

15. Section 501 of The Communications Act of 1934, 48 STAT. 1100, as amended, 47 U.S.C.A. § 501 (Supp. 1958), provides criminal sanctions for wiretaps made in violation of § 605. However, though violations of § 605 by police officers have often been revealed in court, the only prosecutions under § 501 appear to be against private citizens. See United States v. Gris, 247 F.2d 860 (2d Cir. 1957); Reitmaster v. Reitmaster, 162 F.2d 691 (2d Cir. 1947); United States v. Gruber, 123 F.2d 307 (2d Cir. 1941).

16. To constitute the crime there must be both an interception and a divulgence. See United States v. Coplon, 91 F. Supp. 867 (D.D.C. 1950) (dictum p. 871), *reversed on other grounds*, 191 F.2d 749 (D.C. Cir. 1951).

17. 302 U.S. 379 (1937). *Cf.* United States v. Bonanzi, 94 F.2d 570 (2d Cir. 1938); United States v. Reed, 96 F.2d 785 (2d Cir. 1938).

18. Olmstead v. United States, 277 U.S. 438 (1928).

In the second trial of the same accused the Court widened its interpretation to include barring any evidence obtained even indirectly from information resulting from wiretapping.[19] In this case the Court stated:

> The issue thus tendered by the Circuit Court of Appeals is the broad one, whether or no[t] § 605 merely interdicts the introduction into evidence in a federal trial of intercepted telephone conversations, leaving the prosecution free to make every other use of the proscribed evidence. Plainly, this presents a far-reaching problem in the administration of federal criminal justice. . . .
>
> We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in *Nardone v. United States, supra.* That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 302 U.S. 379, 383. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, is pertinent here: '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.' . . . .
>
> Here . . . the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. 251 U.S. 385, 392.[20]

Basically, the *Nardone* cases interpreted section 605 to say that any wiretap evidence obtained by federal agents is inadmissible in federal courts, not because of the rules of evidence but apparently because wiretapping was a violation of law — and the courts were not disposed to allow one guilty of such violations to use the fruits of the crime, *i.e.,* the evidence.

The coverage of the statute was further broadened in *Weiss v. United States,*[21] an action wherein petitioners were indicted for using the mails and

---

19. Nardone v. United States, 308 U.S. 338 (1939). *Cf.* United States v. Costello, 171 F. Supp. 10 (S.D.N.Y. 1959).
20. 308 U.S. at 339-41.
21. 308 U.S. 321 (1939).

for conspiracy. On the issue of whether the defendants had guilty knowledge, the Government introduced evidence of wiretaps. Petitioners objected on the grounds that the introduction of this evidence violated section 605. The Government contended that the act applied only to interstate communications. The Court rejected this contention and held that section 605 applied to intrastate as well as to interstate communications.[22] This decision was based upon the policy underlying the majority view in the first *Nardone* case.

Subsequent to the *Nardone* decisions the courts limited the statute's sweep in two cases. In *Goldman v. United States*[23] the Supreme Court held that the placing of a detectaphone against a wall in such a manner as to enable federal officers to overhear telephone conversations in the next room, did not constitute "an interception" prohibited by the statute and said that it was merely analogous to a person overhearing a conversation in the same room. This was a conspiracy under the Bankruptcy Act and in order to overhear conversations two federal agents obtained access to the office of the defendant and installed a dictaphone in the partition wall, with ear-phones in the adjoining room. This instrument failed to work so they placed a more delicate instrument against the wall and were thus able to overhear conversations between the accused and another party which a stenographer recorded. The Court held that under the Communications Act, section 605, there was neither a "communication" nor "interception" during the course of transmission.

Perhaps the most severe limitation on the use of the statute was enunciated in *Goldstein v. United States*,[24] which apparently held that one not a party to the intercepted conversation had no standing to object to the divulging of its contents. This was a mail fraud and conspiracy to present false insurance claims and some of the conspirators had confessed and were ready to turn state's evidence. It appeared that this was due to their being confronted with telephone messages alleged to have been unlawfully obtained by wiretapping under section 605. The Court held that their testimony was admissible, even assuming the illegality of the wiretapping, and the divulgence of the intercepted messages as the inducement to the confessions since the witnesses had not been parties to the illegality. This decision was apparently based on a technicality, namely that the statute authorized only the sender to consent to interceptions

---

22. Massengale v. United States, 240 F.2d 781 (6th Cir. 1957), *cert. denied*, 354 U.S. 909 (1957); United States v. White, 228 F.2d 832 (7th Cir. 1956); United States v. Sugden, 226 F.2d 281 (9th Cir. 1955), *aff'd per curiam*, 351 U.S. 916 (1956); United States v. Lipinski, 151 F. Supp. 145 (D. N.M. 1957), *affirmed*, 251 F.2d 53 (10th Cir. 1958).

23. 316 U.S. 129 (1942).

24. 316 U.S. 114 (1942).

and therefore only he was entitled to its protection.[25] Thus, these two decisions remain as the two prime attempts of the courts to curb the broad interpretation of the *Nardone* construction.

Another technicality exists as to the meaning of the word "intercept." As to wiretapping and related matters, the key sentence of this act says "no person not being authorized by the sender shall intercept any communication and divulge or publish" its existence or contents. Several federal courts have interpreted this differently when one party to a telephone conversation consented to a recording.

In the case of *United States v. Yee Ping Jong*,[26] the defendant appealed a federal narcotic conviction, contending that recording of a conversation betweeen himself and a treasury informer was improperly received in evidence. The informer had made the call at the direction of a federal officer. In overruling this contention the court held that such a recording was not an "interception" as contemplated by section 605.[27]

A contrary result has been reached in the Court of Appeals for the Second Circuit. In an opinion written by Judge Learned Hand and concurred in by Judge Augustus N. Hand the court held that the act of an F.B.I. agent who recorded telephone conversations upon a machine attached to a telephone extension, with the consent of one of the parties to the conversation, was nevertheless an interception, and within the prohibition of section 605.[28] Similarly it has been held that the recording of a telephone conversation by one of the parties was a violation of section 605, requiring that evidence obtained thereby be suppressed.[29]

---

25. In On Lee v. United States, 343 U.S. 747 (1952), a violation of the narcotic laws, the Court held that evidence obtained by an undercover agent who engaged the defendant in an incriminating conversation which was transmitted to the witness by a receiver tuned to a microphone hidden on the person of the agent was admissible. In Diamond v. United States, 108 F.2d 859 (6th Cir. 1938) the court held that § 605 prohibited all interception by wiretapping except by persons authorized by the sender to so do. See also United States v. Polakoff, 112 F.2d 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653 (1940), wherein each participant in a telephone conversation is regarded as a "sender".

26. 26 F. Supp. 69 (W.D. Pa. 1939). For an interesting article dealing with recordings see Kupferman, *Rights In New Media*, 19 LAW & CONTEMP. PROB. 172 (1954).

27. *Accord:* United States v. White, 228 F.2d 832 (7th Cir. 1956); Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950); United States v. Pierce, 124 F. Supp. 264 (N.D. Ohio 1954), *aff'd. without opinion*, 224 F.2d 281 (6th Cir. 1955); United States v. Sullivan, 116 F. Supp. 480 (D.D.C. 1953). See also Flanders v. United States, 222 F.2d 163, 167 (6th Cir. 1955) wherein McAllister, C.J., stated, "where, by means of an extension phone, or other device, a third party 'listens in' on a telephone conversation with the consent of one of the parties . . . there is no interception of the communication within the meaning of the statute."

28. *Accord:* James v. United States, 191 F.2d 472 (D.C. Cir. 1951); Reitmaster v. Reitmaster, 162 F.2d 691 (2d Cir. 1947); United States v. Polakoff, 112 F.2d 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653 (1940); United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957).

29. United States v. Stephenson, 121 F. Supp. 274 (D. D.C. 1954) (section 605 is generally restricted to devices requiring physical contact with the telephone system). See Rayson v. United States, 238 F.2d 160 (9th Cir. 1956); Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950); United States v. Silverman, 166 F. Supp. 838 (D. D.C. 1958); United States v. Guller, 101 F. Supp. 176 (E.D. Pa. 1951).

This problem was in large part resolved by the opinion of the Supreme Court in *Rathbun v. United States*,[30] wherein the Supreme Court resolved an important conflict in this area when it ruled that section 605 was not violated when a person listened in on a telephone conversation via an extension telephone, if this was done with the consent of one of the parties. This case concerned the issue of whether the contents of a communication overheard on a regularly used telephone extension with the consent of one party to the conversation was admissible in federal court.

Police officers had listened to a conversation on a telephone extension. The extension had not been installed there for this purpose but was a regular connection, normally used. At the trial of the sender of the message, over objections, the police testified as to the contents of the telephone conversation. The defendant was convicted and the Court of Appeals for the Tenth Circuit and the Supreme Court affirmed.

The Supreme Court, per Warren, C.J., stated:

> Since there was a divulgence of the contents of a communication, the only issue on the facts before us is whether there has been an unauthorized interception within the meaning of Section 605. The federal courts have split in their determination on this question. Some courts have held that the statute proscribes the use of an extension telephone to allow someone to overhear a conversation without the consent of both parties. Others have concluded that the statute is inapplicable where one party has consented. We hold that Section 605 was not violated in the case before us because there has been no "interception" as Congress intended that the word be used. Every statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature. . . .
>
> The telephone extension is a widely used instrument of home and office, yet with nothing to evidence congressional intent, petitioner argues that Congress meant to place a severe restriction on its ordinary use by subscribers, denying them the right to allow a family member, an employee, a trusted friend, or even the police to listen to a conversation to which a subscriber is a party. Section 605 points to the opposite conclusion. . . .
>
> For example, it follows from petitioner's argument that every secretary who listens to a business conversation at her employer's direction in order to record it would be marked as a potential federal criminal. It is unreasonable to believe that Congress meant to extend criminal liability to conduct which is wholly innocent and ordinary.
>
> Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and

30. 355 U.S. 107 (1957).

> may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, interception, has not occurred.[31]

In 1952 the Supreme Court seemed to remove all doubt of whether section 605 applied to state as well as federal court proceedings.[32] Mr. Justice Minton, speaking for the majority, assumed that a violation of section 605 had occurred, but held that though *Nardone* had made wiretap evidence inadmissible in federal courts it did not compel a rule of inadmissibility in state courts.

Thus, as of 1957 the status of the law was fairly clear. Because wiretapping was a crime the courts would not encourage the crime and therefore would not allow its use in the federal courts. The courts had interpreted section 605 to exclude the direct or indirect use of wiretap evidence in the federal courts but had said that they were without power to stop it in the state courts. The prohibition was subject to some limitations, as in *Goldman*[33] and *Goldstein*,[34] but these were technical rather than substantive.

In 1957 the Supreme Court addressed itself to the status of wiretap evidence obtained by state officials under proper laws of their respective states, and the subsequent introduction of that evidence in a federal court. Under the theory that wiretap evidence was not admitted in federal court because it was the fruit of a crime, it would follow that if wiretap evidence were done lawfully then it would not be the fruit of a crime and should be admitted in court. Section 605 apparently had not been applied to state officers and they, so long as wiretapping was lawful within their state, could wiretap, subject to certain limited restrictions which varied in each state.

In order to prevent lawfully obtained wiretap evidence from being introduced in the federal courts, the Supreme Court would have had to reach the conclusion that section 605 either introduced an evidentiary rule or was intended to affect state officers in the federal courts. In *Benanti v. United States*[35] the Supreme Court met the issue squarely and held that section 605 applied to everyone, including state officers, and that the Congress did not intend to allow state legislation which would contradict section 605 and the public policy underlying it.[36]

---

31. 355 U.S. at 108-11.

32. Schwartz v. Texas, 344 U.S. 199 (1952). See also Commonwealth v. Chaitt, 380 Pa. 532, 112 A.2d 379 (1955), *cert. denied*, 350 U.S. 829 (1955), *Cf.*, People v. Stemmer, 298 N.Y. 728, 83 N.E.2d 141 (1948), *aff'd without opinion*, 336 U.S. 963 (1949). Thirty-eight states have statutes which limit the use of wiretapping, only two expressly forbid disclosure; the rest either allow wiretap evidence to be used at will or exempt public officers from compliance. The statutes are summarized in the report of the *New York State Joint Legislative Committee to Study Illegal Interception of Communications.* (N.Y. Legis. Doc. No. 53, 1956).

33. Goldman v. United States, 316 U.S. 129 (1942).

34. Goldstein v. United States, 316 U.S. 114 (1942).

35. 355 U.S. 96 (1957).

In *Benanti*, police officers of the City of New York established a wiretap, as authorized by New York law, in order to obtain evidence that petitioner and others were violating state narcotic laws. Acting upon information secured by the wiretap, the city police stopped and searched an automobile driven by petitioner's brother, and discovered that he was transporting alcohol without the tax stamps required by federal law. No narcotics were found. The federal officers were notified and a prosecution in a United States District Court ensued. Petitioner's motion to suppress the evidence obtained by the wiretap was denied, and he was convicted. The Court of Appeals, Second Circuit, affirmed the conviction and on certiorari the United States Supreme Court reversed, and held unanimously, that evidence obtained as a result of wiretapping by state law enforcement officers, though acting pursuant to state law, and without participation by federal authorities, was inadmissible in a federal criminal prosecution.

What apparently was behind the Court's reasoning was the fact that the very nature of a telephone communication was a property right intended to be protected and that there was too strong a public policy seeking to protect it to allow section 605 to be overridden by a state law. The Court stated:

> Respondent does not urge that, constitutionally speaking, Congress is without power to forbid such wiretapping even in the face of a conflicting state law. . . . Rather the argument is that Congress has not exercised this power and that Section 605, being general in its terms, should not be deemed to operate to prevent a State from authorizing wiretapping in the exercise of its legitimate police functions. However, we read the Federal Communications Act, and Section 605 in particular, to the contrary.
>
> The Federal Communications Act is a comprehensive scheme for the regulation of interstate communications. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. . . . The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted in *Weiss*, the intercepter cannot discern between the two and will listen to both. Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position. Respondent points to portions of the Act which place some limited authority in the States over the field of interstate communication. The character of these matters, dealing with aspects of the regulation of utility service to the public, is technical in nature in contrast to the broader policy considerations motivating Section 605. Moreover, the very existence of these grants of authority to the States underscores the conclusion that had Congress intended to allow the States to make exceptions to Section 605, it would have said so. In light of the above considerations, and keeping in mind this comprehensive

> scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy. . . .[36]

By virtue of this decision the Court apparently has denied admission of any wiretap evidence in a federal court regardless of its origin. It should be noted, however, that section 605 does not make wiretapping per se an offense; it is the interception and divulgence of the contents of the message which constitutes the crime and both elements are essential to complete the offense.

Also, worthy of mention is the fact that since section 605 makes evidence obtained by intercepting telephone communications inadmissible in federal courts, leads obtained by wiretapping may not be utilized by the prosecution. The fact that wires were tapped does not vitiate a criminal prosecution if the Government can establish to the court's satisfaction that its proof at the trial had an origin independent of wiretapping.[37] This pre-trial procedure, wherein the court, outside the hearing of the jury, decides whether the Government has independent means of proving the charge, is usually known as a "Nardone hearing."

An area still unresolved by the United States Supreme Court is the extent the indirect use of wiretapping, beyond a mere lead, approaches the exclusionary area. This unresolved area is best illustrated by an example. Suppose the police authorities (P) suspect Mr. X of being connected with Crime A. Pursuant to state law P wiretaps X's telephone. They find sufficient information about Crime A to present to an indicting body. X is brought before that body and, in the course of his several hours of testimony, facts unrelated to Crime A are discovered. The extent of the exclusionary rule as applied to these facts, which are irrelevant to the original Crime A is the subject of an unresolved area in the law.

This problem has two aspects. If the inadvertently discovered facts were first discussed in a telephone conversation which was wiretapped, then, even though unrelated to Crime A it seems clear that under the drift of present court doctrine this incidental information is excluded from presentation in federal courts. However, suppose this additional or inadvertently discovered information has no basis in the wiretapped conversation, but is merely placed upon the record by X. Hearing these inadvertent facts another governmental agency uses these leads for an eventual prosecution in the federal courts. Is this subsequent prosecution tainted because it is remotely connected to another crime about which there

---

36. 355 U.S. at 104-6.

37. Nardone v. United States, 308 U.S. 338 (1939); Sullivan v. United States, 219 F.2d 760 (D.C. Cir. 1955); Coplon v. United States, 191 F.2d 749, 756 (D.C. Cir. 1951); United States v. Weiss, 34 F. Supp. 99 (S.D.N.Y. 1940).

were wiretaps? While it has some connection with wiretap, it appears absurd to taint the subsequent prosecution with the earmarks of wiretap. If this taint were applied then Mr. X could create an immunity as to all prior crimes which he has committed simply by mentioning them and placing them on the record in a hearing directly stemming from wiretapping. The courts evidently intended an exclusionary rule applying to evidence obtained both directly and indirectly from wiretapping. However, to extend this rule to a remote and unconnected fact which is inadvertently uncovered during a tainted investigation is to give Mr. X an immunity not intended by any court.

In the second Frank Costello denaturalization proceeding[38] the court in a clear and scholarly opinion attempted to delineate and limit some absurd effects of the exclusionary rule. In this case the facts disclosed that in 1943 the District Attorney of New York County, acting upon information clearly mingled with wiretapping evidence went before a New York County grand jury and questioned Costello about certain matters unrelated to the subject in the wiretaps, and in some instances only remotely related to any pertinent phase of the grand jury investigation. In one of these forays into the land beyond the grand jury investigative purpose, Costello admitted that he had been engaged in bootlegging in the period preceding his naturalization. This information was not elicited by the use of wiretapping information but was voluntarily advanced in response to a question by his own attorney. On the trial of this denaturalization action Costello's attorney maintained that this admission of bootlegging activity in 1943 was tainted evidence and could not be admitted in evidence sixteen years later. This contention was rejected by the court, per Dawson, J., stating:

> The proposition of the defendant seems to be that because the investigation was precipitated by an intercepted telephone conversation on a purely collateral matter, nothing he said about his criminal activities in other fields could thereafter be used. This would extend the principle of the second *Nardone* case far beyond what the Court determined. It would mean that a man whose telephone had been tapped would be granted immunity for any admissions which he thereafter made, not in the telephone conversations but in answer to any questions in a later investigation. There is no basis for extending the rule to this degree.

Another important issue still unresolved by the Supreme Court is a determination as to whether or not a pre-1934 wiretap is admissible in federal courts. The better rule is that it is admissible based upon the fact that since no rule of evidence excludes wiretap evidence and that it is excluded solely because it is the fruit of a crime created in 1934 it therefore follows that such evidence obtained prior to 1934, being not criminal, is, of course, admissible. This view was propounded by the

38. United States v. Costello, 171 F. Supp. 10 (S.D.N.Y. 1959).

Second Circuit in the first *United States v. Costello* case,[39] wherein Clark, C.J. stated:

> We have also considered whether the decision can be sustained on the ground that, as shown by the record, the government's evidence was by and large inadmissible. We hold that no such demonstration was made. Wire tapping in 1925 and 1926 allegedly produced the defendant's prosecution in the latter year. The fruit of such tapping was spread on the public record at the open trial for bootlegging. We do not construe § 605 of the Communications Act of 1934, 47 U.S.C. § 605, to render it a crime to republish information which was lawfully intercepted and divulged once before prior to that Act's passage. The fruit of any 1925-26 taps is admissible. . .[40]

Thus, at present, any evidence obtained by wiretaps since 1934, whether by state or federal officers, is inadmissible in the federal courts.[41] This does not mean that in a case where there is wiretap evidence a conviction cannot stand, because if there is evidence emanating from areas other than wiretaps the conviction can stand on those grounds alone.

As a practical matter the objecting party has the burden of showing that his wire was tapped.[42] Once he does so the prosecution must show that the tap did not lead to the evidence introduced.[43]

Wiretapping is difficult to prove and mere circumstantial evidence on the part of the complainant which falls short of "solidity" and "lacks definiteness" is insufficient to grant a hearing on the wiretapped evidence.[44] This demonstrates a weakness of the *Nardone* rule. A complaining party needs solid evidence of wiretapping and such information becomes available to him only if the Government has been careless.

In the second *Nardone* case[45] the Court spoke of the burden on the defendant, as follows:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wiretapping was unlawfully employed. Once that is established — as was plainly done here — 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.[46]

---

39. 247 F.2d 384 (2d. Cir. 1957), *reversed on other grounds*, 356 U.S. 256 (1958).
40. 247 F.2d at 387.
41. The rule of wiretap evidence being inadmissible in federal court has been applied to federal officers testifying in state court prosecutions. See Rea v. United States, 350 U.S. 214 (1956).
42. United States v. Frankfeld, 100 F.Supp. 934, 939 (D.Md. 1951).
43. United States v. Coplon, 185 F. 2d 629, 636 (2d Cir. 1950), *cert denied*, 342 U.S. 920 (1952).
44. United States v. Frankfeld, 100 F. Supp. 934 (D. Md. 1951).
45. Nardone v. United States, 308 U.S. 338 (1939).
46. 308 U.S. at 341.

From this language the conclusion would appear that the party seeking to suppress the use of evidence on the ground of wiretap must show more than the mere existence of wiretaps at some time. He must show further that some substantial part of the case has been derived from wiretaps.[47]

It appears that the current state of the exclusionary rule in the federal courts is clear. A defendant who was a party to a call may move to have the court suppress the contents, and any evidence obtained directly or indirectly therefrom. This prohibition extends to both interstate and intrastate calls overheard by *anyone*, so long as the listening in was without the permission of the other party to the call.

Repeated efforts have been made in recent years to permit a degree of wiretapping by federal law enforcement officers. The conclusion as to whether or not the law should be relaxed must come from the results of a process of weighing the equities. Admittedly the present federal law hinders enforcement officers. Former Attorney General Herbert Brownell, Jr., in a thought provoking and informative discussion of the apparent need for wiretapping in certain areas, has stated,[48]

> Re-evaluation of the critical situation today makes it clear that authorized wire tapping under careful restrictions in cases involving our national security is not 'dirty business' at all, but a common sense solution by Congress which will protect the liberty and security of all the people from those who wish to see it impaired.
>
> Prior to the invention of the telephone and telegraph, you could track a criminal down by shadowing him and checking his contacts. These days, most spies, traitors, and espionage agents are usually far too clever and devious in their operations to allow themselves to be caught walking down the street with their accomplices. Trailing them or trapping them is difficult unless you can tap their messages. Convicting them is practically impossible unless you can use these wiretaps in court. And it is, of course, too late to do anything about it after sabotage, assassinations and 'fifth column' activities are completed. . . . Some opponents to wire tapping also claim that they are con-

47. In United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941), *affirmed*, 316 U.S. 114 (1942), Judge Hand referred to the language of the Supreme Court as quoted above and stated at page 488, "That language cannot indeed serve as a ruling that the prosecution has the burden to show how far its proof has 'an independent origin,' but it is consonant with that position, and to some extent suggests it. In any event it appears to us that this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled." See also United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).

48. Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L. Q. 195, 205 (1954). See also Brown & Peer, *The Wiretapping Entanglement: How to Strengthen Law Enforcement and Preserve Privacy*, 44 CORNELL L. Q. 175 (1959).

> cerned with the protection of innocent persons who through no fault of their own may have become enmeshed with spies and subversives. This argument has no real validity. . . . No innocent person would be hurt by legislation authorizing wiretaps to be admissible against our internal enemies. . . .

However, allowing enforcement officers to tap wires merely with the approval of one member of the judiciary appears to be too insecure a safeguard.[49] If we are to permit invasions of privacy under the guise of law enforcement, we must adequately insure certain minimal standards. Any proposed legislation in the federal area should provide that at least three judges should approve any petition for wiretapping. This may mean that the Court of Appeals for the appropriate circuit would have to approve the application. This, at best, is a minimal safeguard.

Arguments against permitting any wiretapping are of interest. Justice Frankfurter has stated:[50]

> Suppose it be true that through 'dirty business' it is easier for prosecutors and police to bring an occasional criminal to heel. It is most uncritical to assume that unless the Government is allowed to practice 'dirty business' crime would become rampant or would go unpunished. . . .
>
> My deepest feeling against giving legal sanction to such 'dirty business' as the record in this case discloses is that it makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training. The third degree, search without warrant, wiretapping and the like, were not tolerated in what was probably the most successful administration in our time of the busiest United States Attorney's office. This experience under Henry L. Stimson in the Southern District of New York, compared with happenings elsewhere, doubtless planted in me a deep conviction that these short-cuts in the detection and prosecution of crime are as self-defeating as they are immoral.

Against this approach is the apparent necessity for aiding law enforcement within proper bounds. The status of the law at present is closely in line with the rules preferred by Justice Frankfurter. Any changes in these rules are within the province of the Congress; the courts have had their say.

---

49. This is the procedure followed in states such as New York. See N. Y. CONST. art. I, § 12 (1954); N. Y. CODE OF CRIMINAL PROCEDURE, § 813a (1942).
50. On Lee v. United States, 343 U.S. 747, 760-1 (1952) (dissent).