Journal of Criminal Law and Criminology

Volume 49 | Issue 4 Article 11

1959

Wiretapping and the Supreme Court

Garry R. Bullard

CRIMINAL LAW COMMENTS AND ABSTRACTS

WIRETAPPING AND THE SUPREME COURT

GARRY R. BULLARD

The immeasureable benefit which society derives from the telephone is obvious to all. Equally apparent is the fact that the telephone's use is by no means limited to socially desirable endeavor. It serves without discrimination the housewife, businessman, kidnapper, doctor, lawyer, pimp, and narcotics pusher.[1] This situation, coupled with the relative ease with which a telephone communication can be secretly intercepted, has resulted in a basic conflict of interest in the field of law enforcement: the interest of the individual in the protection of his personal privacy; and the sometimes conflicting interest of society in the detection, prevention, and prosecution of crime.

The development of the common law obviously did not include rules governing electronic communications of any form. Therefore, in the absence of legislative enactments, communications by telephone or telegraph could be intercepted with impunity, interception being limited practically only by the means available. When legislative action did come it pertained only to the protection of the communication equipment. It did not extend to the interception of the communication. Thus, the early state statutes had no real effect upon the use of wiretapping inasmuch as the common law rule admitted evidence regardless of its source. Evidence obtained from a wiretap was therefore admissible even under a state statute prohibiting tampering with a telephone or telegraph wire.[2] If such evidence were to be excluded, action must be forthcoming in one of two possible ways: either express legislative prohibition of the practice of wiretapping,[3] implemented by judicial exclusion of evidence obtained in violation of the statute,[4] or express legislative exclusion of wiretap evidence itself. An early attempt was made, how-

[1] See Rosenzweig, *The Law of Wiretapping*, 32 CORNELL L.Q. 514 (1947).

[2] 8 WIGMORE, EVIDENCE §2183 (3d ed. 1940). Wiretap evidence would be treated as any other evidence obtained in violation of the law; in this case, state malicious mischief statutes prohibiting tampering with the wires.

[3] This was the case in 1918, when the government seized the communications network and prohibited all wiretapping during seizure. 40 STAT. 1017, 42 U.S.C. §18 (1918). This statute lapsed when the government returned the systems to private enterprise. However, a later appropriation bill prohibited all wiretapping in the enforcement of prohibition. Department of Justice Appropriation Act of March 1, 1933, 47 STAT. 1381.

[4] This was the case in the rule announced by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914), which excluded all evidence obtained in violation of the fourth amendment, as a means of discouraging violation of the amendment by unlawful search or seizure.

ever, to attack the use of wiretap evidence from yet a different direction. This attempt involved the bringing of wiretapping within the fourth amendment prohibition of unreasonable search or seizure.[5] This attempt failed when a closely divided court held in *Olmstead v. United States*,[6] that wiretapping, inasmuch as it did not involve the element of trespass, was not violative of the fourth amendment.[7] This decision was accompanied by vigorous dissents by both Justice Holmes and Justice Brandeis, who deplored the general practice of wiretapping.[8] The spirit, at least, of their opinions was to re-appear, however, in subsequent majority decisions.[9]

The effect of the *Olmstead* case was that between 1928, the date of that decision, and 1937, the date of the next Supreme Court ruling on the subject, wiretapping was admissible in federal courts in the absence of a statute construed to prohibit the practice of wiretapping itself or the use of evidence so procured.[10] An attempt was made shortly after the *Olmstead* case to provide such legislation, but it failed.[11] During this period, however, a statute was passed which was to become of paramount importance later on. The act received none of the debate or fanfare due an issue as controversial as wiretapping. It was the Federal Communications Act.[12] Its expressed legislative purpose was to create a new governmental agency, the Federal Communications Commission, to regulate and bring order to a rapidly mushrooming communications industry.[13] The act contained no direct reference to wiretapping. One section, §605, however, made reference to, and did prohibit the interception and divulgence of "any interstate or foreign communication by wire or radio."[14] The purpose of this section ostensibly was to transfer the terms of Section 27 of the Radio Act of 1927[15] to the authority of the Federal Communications Commission for enforcement.[16] The lower federal court decisions involving the use of wiretap evidence immediately subsequent to the enactment of Section 605 followed this construction of the section, and failed to find it pertinent to wiretapping.[17] In a 1937 decision of the United States Supreme Court, *Nardone v. United States*,[18] however, the Court held that wiretapping and the admission of wiretap evidence in a federal court constituted a violation of Section 605. The Court ruled that the "plain language" of the statute forbids any person from *intercepting and divulging* the contents of any telephone message.[19] The

[5] U. S. CONST. Amend. IV.

[6] 277 U.S. 438 (1928).

[7] The 5–4 majority narrowly construed the fourth amendment so as to exclude mere sight or hearing beyond the confines of one's home from the scope of an "unreasonable search or seizure" under the amendment.

[8] Brandeis and Holmes differed only as to the approach taken to express their mutual opposition to the practice. Brandeis approached the practice from the direction of an invasion of personal liberty. He considered wiretapping a far greater invasion of privacy than tampering with the mail, because, among other evils, it meant an invasion as to both parties, not just one. 277 U.S. at p. 475. Holmes, on the other hand, was shocked by the government's participation in this "ignoble" or "dirty business". 277 U.S. at p. 470.

[9] Had the attempted application of the fourth amendment to wiretapping been successful it would, of course, have put evidence obtained by this means in the same category as evidence physically seized incident to an unreasonable search or seizure and therefore inadmissible under the federal exclusionary rule announced in the *Weeks* case. After the *Olmstead* case, however, the fourth amendment was discarded as a vehicle of exclusion.

[10] Even if there were a statute prohibiting wiretapping, such evidence still would have been admissible under the common law rule, in the absence of express legislative exclusion or judicial exclusion undertaken to implement the intent of a statute prohibiting the practice.

[11] H.R. REP. No. 5416, 71st Cong., 1st Sess. (1929).

[12] 48 STAT. 1103 (1934), 47 U.S.C. §605 (1934).

[13] H.R. REP. No. 1850, 73d Cong., 2d Sess. 3. (1934).

[14] 48 STAT. 1103 (1934), 47 U.S.C. §605 (1934): "Unauthorized publication or use of communications. 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 contents, substance, purport, effect or meaning thereof . . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents . . . of such intercepted communication to any person; 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 contained therein for his own benefit or for the benefit of another not entitled thereto."

[15] §27 Radio Act of 1927, 44 STAT. 1162 (1927), 47 U.S.C. §81 (1927): "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 messages to any person."

[16] S. REP. No. 781, 73d Cong., 2d Sess. (1934).

[17] In Valli v. United States, 94 F.2d 687 (1st Cir. 1938); Beard v. United States, 82 F.2d 837 (D.C. Cir. 1936), *cert. denied*, 298 U.S. 655 (1936); and United States v. Genello, 10 F. Supp. 751 (M.D. Pa. 1935), the courts failed to consider the applicability of the newly passed §605. In Smith v. United States, 91 F.2d 556 (D.C. Cir. 1937), a prosecution for evasion of liquor tax, the court did take up the question and summarily rejected the applicability of §605 to wiretapping.

[18] 302 U.S. 379 (1937).

[19] The majority literally construed the statute so that the "plain words" of §605 forbid anyone, unless authorized by the sender, to intercept a telephone

Court's literal construction of the statutory language included wiretapping by *federal* agents within its prohibitive scope as well as the presentation of evidence gained in this manner.[20] The decision, while not overruling the Court's previous refusal to outlaw wiretapping on constitutional grounds,[21] reached the same result by statutory interpretation.[22]

Initially, by the *Nardone* decision, only direct wiretap evidence was made inadmissible. The exclusion of derivative wiretap evidence (evidence obtained as a result of information gained from a tap)[23] and of evidence obtained from tapping an intrastate communication soon followed.[24] The procedure for determining a claim of wiretapping also was soon prescribed.[25]

Some hint of a need for an exception to or a modification of this policy, however, became visible.[26] This need appears to have resulted in two simultaneous decisions. The first case ruled that the protection afforded by Section 605 was a personal one, limited to the actual participants in the intercepted conversation.[27] The approach adopted in the second case involved a limitation upon the applicability of Section 605 itself through a narrowed interpretation of what constitutes an interception under the statute.[28]

---

message and direct in equally clear language that "no person" shall divulge or publish the message or its contents to any person.

[20] This was a principal ground upon which the government chose to base its contentions, reasoning that the government was exempt from the definition of "no person", while putting less emphasis upon the basic issue of the applicability of §605 to wiretapping generally. If successful, this contention would have given the government access to wiretapping while denying it to all others. However, this distinction failed, the court holding that "no person" under the statute comprehends federal agents and that the ban on communication to "any person" bars testimony as to the contents of any intercepted message. Nardone v. United States, *supra* note 18.

[21] The court's refusal to find wiretapping a violation of the fourth amendment in the *Olmstead* case, was not disturbed.

[22] This result clearly represents the eventual triumph of the attitude of revulsion toward the practice of wiretapping expressed by Holmes and Brandeis in their respective dissenting opinions in the *Olmstead* decision.

[23] After the reversal of the convictions in the first *Nardone* case, the government re-arrested the defendants and brought them to trial on the strength of the derivative wiretap evidence. The Court responded to this attempt by completely rejecting any definition of "interception" which did not include the derivative use of wiretapping. Nardone v. United States, 308 U.S. 338, 340 (1939).

[24] Weiss v. United States, 308 U.S. 321 (1939).

[25] This procedure provides for the pre-trial determination of: (1) whether the accused can establish that wiretapping was, in fact, employed; and (2) if so, whether the government's case is substantially derived from that source. Nardone v. United States, *supra* note 23 at p. 341.

[26] The high point in the policy of total exclusion appears to have been reached prior to World War II, in Weiss v. United States, *supra* note 24. The effect of the wartime need for effective counter-espionage is purely speculative. However, there was considerable pressure to loosen up wiretap policy from both the executive and legislative branches of the government, as well as from administrative agencies. Whatever significance it may have, the first modification in the Court's position came shortly after Pearl Harbor.

The existence of executive pressure even before then is indicated by a latter written by President Roosevelt on Feb. 25, 1941, to J. Edgar Hoover. It is quoted in part by Mr. Hoover in a letter published in 58 YALE L.J. 401, 422 (1949). The letter strongly indicates the President's approval of wiretapping in the investigation of espionage and sabotage.

For reference to legislative pressure embodied in some 30 proposals to legalize wiretapping in at least some limited manner, see Comment, 52 MICH. L. REV. 430 (1954).

Mr. Roosevelt's letter seems to have been prompted by Mr. Hoover's testimony before a Congressional Committee on Feb. 17, 1941, at which time Mr. Hoover defended the use of wiretapping in certain fields, such as espionage, kidnapping and extortion. 58 YALE L.J. 401 at 423–424.

[27] Goldstein v. United States, 316 U.S. 114 (1942). In this case one convicted as a result of testimony elicited by the use of a tapped conversation to which he was not a party was not heard to claim the protection of §605.

[28] Goldman v. United States, 316 U.S. 129 (1942). Inasmuch as this case involved a potentially greater limitation on the scope of §605 it is a far more significant qualification than that set forth in the *Goldstein* case. The case involved the seizure of a communication before it entered the telephone receiver via the use of a detectaphone pressed against the wall of an adjoining room by federal agents, thereby raising the issue of what constitutes an "interception" under the statute. The Court met the issue by finding "interception" to be the seizure of a message while within the means of communication, after sending and prior to receipt. The narrowness of this definition strongly inferred a considerable departure from the broad policies motivating the *Nardone* decisions.

This interpretation impliedly condones another type of interception applied with limited exception by the circuit courts, that of consent by one of the parties to a transcription made at one end of the communication.

Another refusal to apply §605 via this route came ten years later in On Lee v. United States, 343 U.S. 747 (1952), in which the court refused to exclude a transcription made via the use of a radio transmitter hidden on the person of a federal informer, who engaged the defendant in conversation within the defendant's place of business. The evidence was admitted on the narrow grounds that there was no trespass, and therefore, no unreasonable search or seizure. The dissent by Justice Douglas indicated that mere "lipservice" is being paid the concept that wiretapping is "dirty business." This dissent appears to illustrate that the attitude of the Court had moved considerably from that expressed in the *Nardone* decisions.

The personal privilege doctrine meant simply that persons who were not actual participants in the telephone communication that was being tapped were precluded from claiming the protection of Section 605.

The second approach limited the applicability of Section 605 by restricting the concept of an "interception" under the statute to a wiretap interposed between the point of transmission and receipt.[29] This meant, in effect, that a recording made at either end of a telephone communication was not within the scope of the act. Prior to this interpretation, any recording, regardless of where made, was considered within the statute. This limitation upon the exclusion of wiretap evidence under Section 605 already had been applied,[30] with some exception,[31] in the lower federal courts.

The latest court decision on the general subject of wiretapping, *Benanti v. United States*,[32] arose when the New York police, during a narcotics investigation, tapped a telephone which was known to be used by the defendant. The interception was instituted under a New York statute which provided for the granting of a warrant to install a tap, upon the *ex parte* testimony of a police officer above the rank of sergeant.[33] The tap resulted in information which led to the arrest of the defendant with quantities of illegal whiskey in his possession. This constituted a federal offense and the case was accordingly turned over to federal authorities for prosecution in a federal district court. The federal authorities made use of the evidence obtained from the wiretap by the New York police and secured a conviction.[34] On appeal, the court of appeals was confronted with the problem of the admissibility in a federal court of wiretap

[29] This construction did not originate with the Supreme Court pronouncement in the *Goldman* case. In fact, it is derived from a much earlier federal court ruling in United States v. Yee Ping Jong, 26 F. Supp. 69 (W.D. Pa. 1939). The court there admitted a recording of a telephone conversation made at one end of the line with one party's consent, upon a finding that this practice did not amount to an "interception" under §605: "The manner in which the conversation in question was recorded does not seem to present such an interception as is contemplated by the quoted statute. Webster's *New International Dictionary* defines the verb 'intercept' in part as follows: 'To take or seize by the way, or before arrival at the destined place:' The call to the defendant was made by Agent White, and the conversation between his interpretor and the defendant was not obtained by a 'tapping of the wires' between the locality of the call and the locality of answer by an unauthorized person, but was, in effect, a mere recording of the conversation at one end of the line by one of the participants." This definition was approved by the Supreme Court in the *Goldman* case.

This narrow interpretation of the term is expressed by the dissent in Polakoff v. United States, 112 F.2d 888 (2nd Cir. 1940), which states that "interception under the statute doesn't refer to a communication which has reached its intended destination and is recorded there."

[30] United States v. Lewis, 87 F. Supp. 970 (D.C. 1950), is the first case to follow the *Yee Ping Jong* decision insofar as consent by one party was held to remove a tap from the scope of an "interception" under §605. Also following this approach are the later cases of United States v. Sullivan, 116 F. Supp. 480 (1953); Flanders v. United States, 222 F.2d 163 (6th Cir. 1955); Douglas v. United States, 250 F.2d 576 (4th Cir. 1957); and Rathbun v. United States, 236 F.2d 514 (10th Cir. 1956), *affirmed* 355 U.S. 107 (1957). In the latter two cases officers listened in on an extension phone with the consent of the party receiving the call. The distinction between listening in on an extension phone and at the only outlet does not appear to be a very great one. Therefore, the Supreme Court's affirmation of the lower court decision in the *Rathbun* case, appears to lend at least tacit sanction to the effect which the lower court gave to one party's consent, insofar as the applicability of §605 is concerned.

This, of course, is in addition to the Supreme Court's earlier endorsement, in *Goldman v. United States*, of the definition of 'interception' advanced in the *Yee Ping Jong* case.

[31] Opposed to the interpretation excluding transcriptions made with one party's consent from the scope of "interception under the statute were the Second Circuit decisions in Polakoff v. United States, *supra* note 29; Reitmeister v. Reitmeister, 162 F.2d 691 (2nd Cir. 1947), and United States v. Hill, 149 F. Supp. 83 (S.D. N.Y. 1957). The spirit of these decisions remained steadfast to that of *Nardone* in giving the broadest possible scope to the statute so as to afford personal privacy maximum protection, even at the expense of society's competing interest in the apprehension of criminals.

The former two decisions, however, were both by a closely divided court; and there has been considerable feeling that the majority's broad interpretation of "interception" could no longer stand in the light of the Supreme Court's definition of interception in the *Goldman* case. As indicated, this limits the protection of §605 to messages still within the means of communication itself. This feeling is expressed in United States v. Sullivan, *supra* note 30, which expresses certain doubt, in view of the *Goldman* case, as to the continued vitality of the *Polakoff* approach. James v. United States, 191 F. 2d 472 (D.C. Cir. 1951), appears to follow the *Polakoff* rule, impairing the authority of the *Lewis* case on the subject in the District of Columbia circuit. However, the district court in *United States v. Sullivan* declined to follow the *James* case on the grounds that the upper court definition of "interception" to include transcripts made with one party's consent was *obiter dictum*, and was based on the *Polakoff* case, the authority of which was considered to be impaired: "On principle as well as in the light of the state of authorities . . . the conclusion seems inescapable that the Act of Congress does not apply to listening to a telephone conversation with the consent of one of the parties to it."

[32] 244 F.2d 389 (2nd Cir. 1957), 355 U.S. 96 (1957).

[33] NEW YORK CONST. art. 1 §12; N. Y. CODE OF CRIMINAL PROCEDURE §813-a.

[34] This situation is distinguished from that of the *Nardone* cases, in which federal agents themselves engaged in the wiretapping.

evidence obtained by state officers incident to the enforcement of state law and in accordance with state procedure, but which was subsequently turned over to federal prosecutors. The court of appeals, in a departure from a former position of total exclusion,[35] upheld the lower court admission of the wiretap evidence upon which the conviction rested,[36] holding that Section 605 was no longer applicable to the problem.[37] The court instead applied the principles governing the admissibility of evidence under the federal exclusionary rule,[38] and held the evidence admissible under the exception to the rule which permits the use of evidence not seized by, or in conjunction with, federal agents,[39] or in the enforcement of federal law.[40] The Supreme Court, however, granted certiorari and reversed the court of appeals, holding the wiretap evidence inadmissible.[41] The Court's ruling appears to have rested primarily upon the gounds that: (1) Section 605 creates a federal right of freedom from the admission in a federal court of evidence procured by wiretapping; and (2) this right may not be indirectly contravened by the use of a state statute. The lower court's position that Section 605 may no longer be considered applicable was wholly rejected.

At first glance the *Benanti* decision apparently indicates that the Court repented any of its deviations from the *Nardone* spirit of total exclusion. If so, the result has been effected by resort to the conveniently available Section 605. The Court, as in the *Nardone* cases, declared itself bound by a "clear mandate" from Congress prohibiting the use of wiretap evidence.[42] It therefore found the use made of wiretap evidence in the *Benanti* case to be no different than the derivative use forbidden by *Nardone*. The broad policy of translating "into practicality the broad considerations of morality and public well-being,"[43] which motivated the Court's former decisions, was reiterated, only this time in terms of enhancing "the proper administration of criminal justice."[44]

Part of the *Benanti* case involved a novel question in the law relative to wiretapping—whether the Section 605 prohibition of the use of wiretapping in a federal court may be avoided where the evidence is properly obtained under state law incident to the enforcement of state law, and only subsequently turned over to federal authorities where a federal offense happens to have been involved. The Court held that the states have been pre-empted in this field by Section 605, at least insofar as admission into evidence in a federal court is concerned.[45] In so doing, it declared that the "comprehensive scheme of interstate regulation and public policy underlying §605," precludes the possibility of a state legislature avoiding the prohibition which Section 605 sets up in "plain terms."[46]

The validity of the Court's position would be unassailable if the intent of Congress were, in fact, that attributed to it by the Court. The question is, however, did Congress intend also to include a

[35] As pointed out above, see note 31 *supra*, the Second Circuit, under Learned Hand, had hitherto strictly conformed to the spirit of the *Nardone* decisions.

[36] There is little doubt that derivative wiretap evidence formed almost the entirety of the government's case, the arrest of the defendant resulting from information obtained from the tap.

[37] In this departure from the attitude of the *Nardone* cases, the court ruled that its prior policy of totally excluding wiretap evidence under §605 is no longer tenable in light of subsequent Supreme Court affirmation of both state and federal convictions based on wiretapping.

[38] Thus it appears that the court returned to the principles which were rejected in the *Olmstead* case, the application of the criteria used to determine admissibility of unlawfully seized evidence. In doing so, the court supports its position by citing the parallel drawn in the *Goldstein* case, between the policy of preventing violation of the fourth amendment and the Federal Communications Act.

This amounts to a statement in Goldstein v. United States, *supra* note 27, at p. 120, that although wiretapping, "does not amount to a search and seizure prohibited by the fourth amendment . . . we have applied the same policy in respect of the prohibition of the Federal Communications Act."

[39] United States v. Benanti, 244 F.2d 389, 392 (2nd Cir. 1957).

[40] 244 F.2d at 393. See also: *In re* Milburne, 77 F. 2d 310 (2nd Cir. 1935) and Byars v. United States, 273 U.S. 28 (1927).

[41] Benanti v. United States, 355 U. S. 96 (1957).

[42] The express return to both the broad scope and applicability given §605 in the Nardone decisions, is apparent in the following language: "Confronted as we are by this clear statute and resting our decision upon its provisions, it is neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the Fourth Amendment. Section 605 contains an express, absolute prohibition against the divulgence of wiretapping. Nardone v. U. S., 302 U.S. 379, 382. This case is but another example of the use of wiretapping that was so clearly condemned under the circumstances in the Second *Nardone* decision." 355 U. S. at 158–159.

[43] Nardone v. United States, *supra* note 23.

[44] Benanti v. United States, *supra* note 41.

[45] Whether this extends to admissibility in a state court is by no means clear. On its face, at least, the decision doesn't appear to create a federal right to freedom from the admission of wiretap evidence in a state court. If it did, state court admission of such evidence would be subject to attack under the fourteenth amendment.

[46] Benanti v. United States, *supra* note 41.

far reaching rule of criminal investigation and evidence when it passed the act purportedly aimed at the establishment of a unified agency to regulate the communications industry?[47] Was Congress motivated by those "broad considerations of morality and public well-being,"[48] which the Court ascribed to it? In short, is wiretapping part of the "comprehensive scheme of interstate regulation and the public policy underlying §605?"[49] The evidence is to the contrary. It seems clear that both the "broad considerations of morality and public policy," and the purpose of enhancing the "proper administration of criminal justice," emanate not from the intent of Congress, but from the attitude of the Supreme Court itself toward wiretapping.

The weakness of the Supreme Court's position is demonstrated in the *Nardone* case, where it recognized that attempts to specifically reach wiretapping after the *Olmstead* decision had failed in Congress.[50] It also recognized that the express purpose of the act involved the creation of the Federal Communications Commission and the transfer of authority over wire and radio communication to that agency.[51] The basic weakness in the Court's position appears to stem from an unwillingness to move on to the motivation behind the creation of the Federal Communications Commission. These purposes embody the fundamental objectives behind the enabling legislation itself, such as the insurance of reasonable and nondiscriminatory rates, the control of mergers within the industry, and the regulation and limitation of the growth and power of holding company control.[52]

The scope of the Federal Communications Commission included the consolidation of the existing powers of the Interstate Commerce Commission, the Radio Board, and the Postmaster General in order to effectively implement these objectives.[53] Prior to this consolidation, the rather complex administrative system and divided regulatory power in the field hindered their successful attainment.

The error of the Court lay in its failure to recognize that the legislation was merely an expedient alteration of the administrative structure to better accomplish existing purposes,[54] *i.e.* the regulation and control of the communications companies through the medium of a unified federal agency.[55] Whatever additions were made to existing law were merely designed to facilitate "effective regulation" by the newly created communications commission.[56]

Further evidence that the prohibition of wiretapping is beyond the scope of Section 605 may be gleaned from the House Committee Report. The report stated that the bill does not "very greatly change or add to existing law," and that "most controversial questions are held in abeyance, for a report by the new commission recommending legislation for their solution."[57] If wiretapping is to be considered a "controversial question," it is apparent that Congress expressly deferred legislation on the subject, pending a report from the new commission. In the light of the Court's recognition of the unsuccessful attempts to legislate on the subject of wiretapping and the close division of the Court in the *Olmstead* case, it appears very difficult to classify wiretapping as anything other than "controversial." Furthermore, the bill refers to and provides the procedure intended by the legislature to be used in dealing with the problem—that procedure being investigation and recommendation by the commission. At any rate, it does not appear to involve

[47] H.R. REP No. 1850, 73d Cong., 2d Sess. 3. (1934).
[48] Nardone v. United States, *supra* note 23.
[49] Benanti v. United States, *supra* note 41.
[50] Nardone v. United States, *supra* note 18, at p. 381.
[51] *Id.* at 382.
[52] H.R. REP. No. 1850, 73d Cong., 2d Sess. 3 (1934).
[53] In the Senate discussions of the bill, Senator Dill, the bill's proponent, speaks of the hitherto inadequate regulation of telephone and telegraph companies and reiterates the purport of the committee report's stated purpose of transferring existing authority of the Interstate Commerce Commission, Postmaster General, and Radio Commission in the area, to the unified authority of the Federal Communications Commission in order to more effectively accomplish this purpose.
[54] This dissatisfaction with the existent administrative structure was expressed in a letter written by President Roosevelt to the Senate on Feb. 26, 1934. This letter called for the unified administrative authority embodied in the bill. It is printed in H.R. REP. No. 1850, 73d Cong. 2d Sess. 3 (1934).
[55] Viewed from this point of view the Act is the communications counterpart of the Interstate Commerce Commission's regulation and control in the area of common carriers by rail. The power of investigation, suspension of rates and schedules, limited use of funds in capital accounty by corporate officers, forfeitures for rebates and offset, and to require filing of contracts between communication companies indicate similarity. The procedures provided by the Act are also similar to those of the Interstate Commerce Commission.
[56] H.R. REP. No. 1850, 73d Cong. 2d Sess. 3 (1934).
[57] *Id.* "The bill is largely based upon existing legislation and except for the change in administrative authority does not very greatly change or add to existing law; most controversial questions are held in abeyance for a report by the new commission recommending legislation for their solution."

any intention to deal currently with the wiretap problem in the Federal Communications Act.[58]

In view of these considerations it may be observed that the Court's "clear mandate" against wiretapping motivated by "broad considerations of morality and public well-being," is a creation purely its own. Certainly it finds no basis in the legislative history of the Federal Communications Act.

The impact of the *Benanti* decision may be interpreted in two different ways. The first possibility is the more restricted one. It simply involves viewing the decision as a refusal by the Court to sanction the new and broad exception the lower courts were trying to make to the rule of general exclusion announced in the *Nardone* decisions. This was perhaps reinforced by the fear that an acceptance of the lower court substitution of the principles of the federal exclusionary rule for Section 605 might possibly undermine the future effectiveness of that section as an anti-wiretapping weapon in the hands of the Court. Consequently, the Court's rejection of the evidence may be viewed in terms of a statutory interpretation and reaffirmation by the Court of the fundamental applicability of Section 605, more than a reversion to the *Nardone* policy of complete exclusion.[59]

The second approach is precipitated by the latter part of the *Benanti* opinion, which may be interpreted as making Section 605 pre-emptive of state legislation in the field of wiretapping, by holding in effect that state legislation may not deny an individual the protection of the federal right afforded by Section 605. The problem thus raised relates to the definition of this federal right created by the section. Is the right the more restricted one of freedom from the introduction of wiretap evidence in federal court only, or does it extend to the admission of *all* wiretap evidence obtained in violation of the Court's construction of Section 605? If the former is the case the decision goes no further than the rejection of the exception put forth by the lower court.[60] However, if the scope of the right created by the Court includes freedom from the admission of all such evidence whatsoever, the future use of wiretap evidence in state courts will be vulnerable to an attack under the fourteenth amendment.[61] Viewing the decision from this standpoint, it might bring on a fresh onslaught against the use of wiretap evidence in the state courts.[62]

---

[58] Pertinent to the subject of the intent of Congress is the only statement relating to the miscellaneous section of the Act, Title VI, containing §605. This explanation was given by the bill's sponsor, Senator Dill, and contained no reference whatever to the highly controversial subject of wiretapping, much less a "clear mandate" of prohibition in the field. In fact, no mention whatever is made of §605, itself. 78 CONG. REC. 8822 (1934).

It would be curious indeed if the Congress intended to enact a broad prohibition in this controversial area without mentioning the practice prohibited in the bill itself or alluding in debate to the section purportedly containing the "clear mandate" of prohibition. All this while the committee report expressly disclaims new legislation on "controversial questions." Therefore, it would appear reasonable to conclude that if the Federal Communications Act and §605 contain such a "clear mandate" against wiretapping it does not emanate from the legislative branch. More reasonably it emanated from the spirit of the dissents expressed by Justice Holmes and Brandeis in the *Olmstead* case.

The committee report, H.R. REP. No. 1850, 73d Cong. 2d Sess. 3 (1934), in analysing the section purported to ban wiretapping states only that:

"§605 . . . prohibiting unauthorized publication of communications, is based on §27 of the Radio Act, but is also made to apply to wire communications."

This cursory treatment of the section also appears to belie any interpretation of the section which would create an intention on the part of Congress to reach the practice of wiretapping with this particular bill.

In light of these considerations the use of the word "intercept" would more readily be explained in terms of incautious draftsmanship in carrying it forward from its use in reference to radio messages than in terms of a "clear mandate" from Congress against wiretapping, or underlying Congressional considerations of "morality and public well-being."

[59] This is supported to some extent by the Court's affirmation, on the same day as the *Benanti* decision, of a conviction resting upon a conversation overheard on an extention phone in Rathbun v. United States, *supra* note 30.

Certainly the deviations from the original policy of complete exclusion discussed above still stand, as does the inapplicability of the fourth amendment to wiretapping:

Goldstein v. United States, *supra* note 27, restriction of the scope of the act to actual participants in the "intercepted" conversation; Goldman v. United States, *supra* note 28, narrowed definition of "interception" under the Act; Schwartz v. State, 344 U. S. 199 (1952), inapplicability of §605 exclusion of wiretap evidence to state courts; and Olmstead v. United States, 277 U. S. 438 (1928), inapplicability of the fourth amendment to wiretapping.

[60] The basis upon which certiorari was granted, the Supreme Court's supervisory powers over the lower federal courts, supports this view.

[61] This matter was apparently settled by Schwartz v. State, *supra* note 59, in which a Texas conviction resting on wiretap evidence was affirmed, the §605 rule of exclusion being held inapplicable to state court admission of wiretap evidence.

[62] However, the Pennsylvania Supreme Court, in Commonwealth v. Voci, 143 A.2d 652 (1958), cert. denied, 27 U.S.L. WEEK 3148 (U.S. Nov. 11, 1958), has reaffirmed its policy of admitting wiretap evidence. The court pointed out that *Benanti* did not over-rule *Schwartz*.

Clearly, the existing situation indicates that a direct mandate by Congress in this area is long past due. In this regard it is essential that Congress give due weight to the great stake which society has in effective law enforcement as opposed to the conflicting right to absolute privacy in the use of the telephone. It is indeed questionable whether any such right whatever exists in one utilizing the communications network to push narcotics to betray his country, or to further any manner of unlawful activity. It is submitted that no such right exists and that one using the communication media in such manner forfeits all right to privacy in that use. The folly of creating a non-existent or purely academic right of privacy at the cost of impairing the effective enforcement of the law and the protection of society is one which should not be tolerated. The current creation of such a right by the Court through its interpretation of Section 605 appears to exact such a price, serving only to shield the criminal element and thwart the proper administration of justice.