Journal of Criminal Law and Criminology

Volume 51
Issue 4 *November-December*

Article 6

Winter 1960

Criminal Law Comment

CRIMINAL LAW COMMENT

WIRETAPPING: THE FEDERAL LAW

Wiretapping is primarily a tool of law enforcement agencies, and thus the majority of federal cases on the subject are concerned with attempts by defendants in criminal prosecutions to procure the exclusion of evidence obtained by wiretapping.

Evidence obtained in violation of the fourth amendment is inadmissible in federal courts.[1] The applicability of the fourth amendment to evidence obtained through the use of wiretap apparatus was first presented to the United States Supreme Court in *Olmstead v. United States*.[2] The *Olmstead* case involved a federal conspiracy prosecution in which the substance of a wiretapped telephone conversation was admitted in evidence. In a five to four decision, the Court held that the evidence was not obtained in violation of the fourth amendment.[3]

The majority decision relied on three basic grounds. First, the Court held that there was no trespass involved inasmuch as the evidence was obtained merely by listening. Thus, there was no search within the meaning of the fourth amendment.[4] Second, the Court indicated that the conversants intended that their voices leave the confines of the room, and therefore the communication was no longer protected by the fourth amendment.[5] Finally, and apparently most important the Court relied on the literal language of the fourth amendment. The amendment refers specifically to searches and seizures of "persons, houses, papers, and effects." Therefore, reasoned the Court, intangibles, such as oral communications, were not intended to be within the protection of the amendment. The majority concluded by indicating that Congressional legislation was the only means by which wiretap evidence could be excluded.

Dissenting, Mr. Justice Holmes refused to apply the fourth amendment to the situation. However, it was his opinion that the common law rule of evidence was overthrown by *Weeks v. United States*[6] and that logical extension of the exclusionary rule resulted in exclusion of evidence obtained in violation of a statute as well as that obtained in violation of the fourth amendment.[7] Holmes' now

[1] Weeks v. United States, 232 U.S. 383 (1914).

[2] 277 U.S. 438 (1928).

[3] The court ignored a Washington statute making wiretapping a misdemeanor. The disregard for state law was probably based on the fact that the case was on the federal level. The evidence was neither unconstitutionally seized nor taken in violation of federal law.

[4] It has been suggested that this rationale is somewhat supported by analogous cases, *e.g.*, use of a flashlight or binoculars to aid sight is certainly not a violation of the fourth amendment. Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L. Q. 514, 530 (1947).

[5] The Court distinguished the protection afforded mails by the fourth amendment from telephone conversations by referring to the constitutional provision establishing the Post Office and the protection afforded by it.

[6] *Supra* note 1.

[7] An analogy may be drawn from McNabb v. United States, 318 U.S. 332, 341 (1942), where the Court pointed out that constitutional rights are not the sole determinant of the admissibility of evidence. Rosenzweig, *supra note* 4, at 553. It must be noted, however, that the *McNabb* case involved FED. R. CRIM. P. 5(a), whereas the *Olmstead* case involved a state statute. Thus, the question is resolved into whether the federal courts should take cognizance of a state statute.

famous phrase epitomizes the view of the minority: "I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[8]

Mr. Justice Brandeis, in a well reasoned dissent, pointed out that though wiretapping is not prohibited by the letter of the amendment, it is obviously a violation of its spirit.[9]

It has been suggested that the *Olmstead* decision was based primarily upon policy considerations.[10] If the Court had determined that wiretapping was a violation of the fourth amendment, the use of such evidence would have been automatically precluded in criminal prosecutions. Thus, the Court's holding left Congress free to provide for that degree of exclusion which it, in its legislative wisdom, deemed proper. However, no legislation was forthcoming, and the *Olmstead* case was the federal precedent in the wiretap area for nearly a decade.[11]

During this period, law enforcement agencies utilized the freedom afforded by the Court to full advantage.[12] In 1935 and 1936 federal agents investigating alcohol smuggling in New York tapped a suspect's telephone line and listened in on approximately 500 calls. Seventy-two of these calls were placed in evidence in a prosecution for violation of the federal prohibition law. At first blush, this appeared to be one more case within the scope of the *Olmstead* holding. However, the defendant's resourceful lawyer seized upon the language of a statutory provision which, theretofore, had not been regarded as applicable to such a situation: Section 605 of the Federal Communications Act.[13] The case, *Nardone v. United States*,[14] reached the Supreme Court before the defendant's contention was accepted.

After reviewing the government's argument in relation to Congressional intent, *i.e.*, that Section 605 was not designed to deal with wiretapping, the Court stated:

> "We nevertheless face the fact that the plain words of §605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *'no person'* shall divulge or publish the message or its substance to *'any person.'* To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the Act forbids such testimony seems to us unshaken by the government's arguments."[15]

The Court determined that both the *interception* and *divulgence* prohibitions of Section 605 were violated, and that the evidence must be excluded.

The government argued in the alternative that the statute was applicable to private persons only and not to law enforcement officers. This conten-

[8] 277 U.S. 438, 470 (1928) (dissenting opinion).

[9] The framers of the Constitution designed its language to cover the needs of the day. Naturally, the invention of the telephone as a means of communication was unforeseen.

[10] GREENMAN, WIRE-TAPPING: ITS RELATION TO CIVIL LIBERTIES 30 (1938).

The Court could have determined that wiretapping is an illegal search and seizure, but that warrants for the purpose of tapping may be issued upon "probable cause" as required by the fourth amendment. In the case of search and seizure the Federal Rules of Criminal Procedure provide a workable standard for probable cause. FED. R. CRIM. P. 41(b). In the area of wiretapping such an approach would create numerous problems. For example, determination of the subject of the search and the limitation of the tapping would be difficult because a wiretap will reveal information not only in relation to the subject under investigation but concerning all matters discussed over the telephone. In addition, if notice of the tap is required to be given to the suspect, he will doubtless refrain from discussing any questionable matters on the telephone.

[11] Bushouse v. United States, 67 F.2d 843 (6th Cir. 1933), and Smith v. United States, 91 F.2d 556 (D.C. Cir. 1937), were decided on the basis of *Olmstead*.

A discussion of proposed legislation may be found in, Westin, *The Wire-Tapping Problem; An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 172–74 (1952).

[12] Bradley & Hogan, *Wiretapping: From Nardone to Benanti and Rathbun*, 46 GEO. L. J. 418, 421 (1958).

[13] ". . . 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; and no person not being entitled thereto, 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 use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ." 48 Stat. 1103 (1934); 47 U.S. C. §605 (1959).

In Beard v. United States, 82 F.2d 837 (D.C. Cir. 1936), wiretap evidence was admitted on the basis of *Olmstead* without reference to Section 605. In Smith v. United States, 91 F.2d 556 (D.C. Cir. 1937), it was contended that Section 605 was applicable, but the contention was summarily dismissed.

[14] 302 U.S. 379 (1937). In *Nardone* the government argued that Section 605 was merely intended to transfer authority over communications to the F.C.C. Most authorities have subsequently agreed. *E.g.*, Rosenzweig, *supra* note 4, at 536; Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L. Q. 337, 366 (1939); Note, 53 HARV. L. REV. 863, 865 (1940); Westin *supra* note 11, at 174; Comment, 49 J. CRIM. L., C. & P. S. 342, 343 (1958). For a discussion of its applicability see *Hearings Before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., pt. 2, at 202 (1958).

[15] 302 U.S. 379, 382 (1937).

tion was also rejected, again upon the exact language of the statute.[16]

Although there seems to be general agreement that Section 605 was never intended by Congress to create an evidentiary rule of such far-reaching significance,[17] it seems unlikely that after over twenty years of application to wiretap cases the Court will now reverse its position. Therefore, it would appear to be more profitable to determine how the Court has applied the statute rather than to dwell upon whether it should have been applied at all.

Section 605 requires both illegal *interception* and *divulgence*.[18] Construction of the term *interception* has caused the federal courts great difficulty. The main source of confusion is the fact that the statute was not written with intent to control telephone wiretapping. This view was implied by Judge Learned Hand in *United States v. Polakoff*,[19] a case involving the use of an extension telephone as a method of obtaining evidence. The statute requires the authorization of the *sender* before the *interception* can be considered lawful. Thus, in this context, two problems are immediately suggested. Who is a *sender*, and is the use of an extension an *interception* within the meaning of the Act? Judge Hand concluded:

> "The word, sender, in §605 is less apt for a telephone talk than a telegram. . . . Each party is alternately sender and receiver and it would deny all significance to the privilege created by §605 to hold that because one party originated the call he had power to surrender the other's privilege. . . . Anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts."[20]

This approach suggests that the privacy of the telephone as a means of communication is to be protected and that listening in is an interception.

Evidence obtained through use of extension phones was excluded by some and accepted by other federal courts.[21] This divergence of views prompted the Supreme Court to grant certiorari in *Rathbun v. United States*.[22] The case involved a prosecution for transmitting an interstate message threatening murder. The police, with consent of the person being called, listened in on a regularly used extension telephone and utilized the substance of the conversation as evidence in the prosecution. The Court held that this was not a violation of Section 605.

Three grounds were given for the holding. First, the Court made a point of the fact that the consent of one of the parties was given.[23] Unlike Judge Hand's approach, the "consent" analysis is based on the theory that the message, rather than a right of privacy, is to be protected.

In the final analysis, the "consent" approach seems to be reasonable. The person giving his consent could testify as to the contents of the message. That he consents to allow an officer or a recording to do it for him seems to be a logical extension of the principle.[24]

The other two bases for the Court's decision in the *Rathbun* case seem unimportant. Whether there

[16] Mr. Justice Sutherland, joined by Mr. Justice McReynolds, the only justices remaining from the majority in the *Olmstead* decision, dissented on the theory that the word "person" in the statute was inapplicable to federal officers under the rule of statutory construction that general words are not sufficient to bind the government. The reference must be specific. The majority espoused the view that this principle was not applicable to the statute here involved but instead applied another canon of construction: "the sovereign is embraced by general words of a statute intended to prevent injury and wrong." 302 U.S. 379, 384 (1937).

[17] *Supra* note 13.

[18] Nardone v. United States, 302 U.S. 379 (1937) intimates this conclusion. If the Act were construed to prohibit either *interception* or *divulgence*, the same result would occur since, without *divulgence* in some form the interception will be unknown.

[19] 112 F.2d 888 (2d Cir. 1940).

[20] *Id.* at 889.

[21] Cases holding use of an extension without the consent of both parties a violation of Section 605: Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); James v. United States, 191 F.2d 472 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 948 (1952); United States v. Guller, 101 F. Supp. 176 (E.D. Pa. 1951). See to the contrary: United States v. Lewis, 87 F. Supp. 970 (D.D.C. 1950); *rev'd. on other grounds*, 184 F.2d 394 (D.C. Cir. 1950); United States v. Pierce, 124 F. Supp. 264 (N.D. Ohio 1954), *aff'd.*, 224 F.2d 281 (6th Cir. 1954); Flanders v. United States, 222 F.2d 163 (6th Cir. 1955).

[22] 355 U.S. 107 (1957).

[23] A later court of Appeals case held that where a police telephone and extension were used there was no violation of Section 605 even though the police listened with the acquiescence rather than at the request of one of the conversants, as was the situation in the *Rathbun* case. Ladrey v. Comm'n, 261 F.2d 68 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 920 (1958). The dissent expressed the view that the holding was inconsistent with *Rathbun*. However, the silence of the person here would seem to indicate an implied consent. In United States v. Barbour, 164 F. Supp. 893 (D.D.C. 1958), evidence obtained by an officer listening in on an extension while a special agent called the defendant at the officer's suggestion was also admitted.

[24] There is some question as to whether consent given subsequent to the wiretap is sufficient. Weiss v. United States, 308 U.S. 321 (1939), excluded such evidence not because the consent came after the wiretap, but because the consent was involuntary. Bernstein, *The Fruit of the Poisonous Tree*, 37 ILL. L. REV. 99, 117 (1942).

is a regularly used extension or whether the extension is installed for the purpose of listening to a specific conversation would not seem to be a rational ground on which to base a determination of whether the statute is violated. This is especially true in view of the Court's last point, that a caller must run the risk of being overheard if the person whom he is calling is equipped with an extension telephone. If one of the parties is said to voluntarily subject himself to this risk it should make no difference whether the phone is installed for the purpose of listening in or for normal use.

Another difficulty in attempting to define the term interception arises in eavesdropping situations, *i.e.*, where electronic devices which require no direct contact with telephone equipment are used. Generally, where a police officer listens without the aid of an extension or wiretap device, the use of such evidence is not regarded by the courts as a violation of Section 605.[25] Even where the consent of neither party is obtained, such evidence has been held admissible.[26] This pattern of the courts' decisions in defining interception is not surprising in light of an earlier holding in *Goldman v. United States*.[27] There, the Supreme Court held that use of an electronic device known as a detectaphone was not an interception within the meaning of the statute, since interception refers to "seizure by way or before arrival at the destined place."[28] The Court also indicated that the fourth amendment was inapplicable because no trespass occurred.[29] The problems raised by the technicality of the Court's distinctions were illustrated by *United States v. Coplon*,[30] where the district court held evidence inadmissible "because of the failure of the government to disclose how the microphone was installed and in what way it differed, if at all, from a wiretap."[31] The formalistic reasoning required by the *Goldman* case has been severely criticized,[32] but the fact remains that the origin of the difficulty must be attributed to the attempt to apply a statute to a situation never intended to be within its purview.[33]

As previously indicated, the *Nardone* case excluded evidence upon the basis that admission would constitute a *divulgence* which the statute prohibited. In 1939 a second *Nardone* case[34] reached the Supreme Court. The same defendants were in-

[25] In Rayson v. United States, 238 F.2d 160, 163 (9th Cir. 1956), the court pointed out:

"It was not interception within the meaning of the statute for another person to listen to what is said through a receiver in the hand of the person to whom the sender is talking. The conversation is completed when heard and not intercepted before it reaches the person to whom it is addressed."

However, in United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957), the court excluded recorded evidence similarly obtained on the ground that the defendant had not consented to the listening in. It would seem that use of an induction coil where no contact with the wire is necessary constitutes an interception if made other than at either end of the line with consent of one of the conversants. In People v. Malotte, 46 Cal. 2d 59, 292 P.2d 517 (1956), use of such a method was not considered interception because it was used at the receiver's end and at his instigation. However, in United States v. Guller, 101 F. Supp. 176, 178 (E.D. Pa. 1951) the court pointed out: "The interception forbidden by Section 605 of the Communications Act . . . must be by some mechanical interposition in the transmitting apparatus itself, that is the interjection of an independent receiving device between the lips of the sender and the ear of the receiver." A broad construction of this language would seem to justify the conclusion that use of an induction coil would result in an interception within the meaning of the Act.

[26] United States v. Bookie, 229 F.2d 130 (7th Cir. 1956), involved a situation in which a police officer directed an arrested person to answer his telephone and hold the receiver so that the officer could hear the conversation. The court allowed the evidence thereby obtained to be admitted. In Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950), an officer in a raid upon a lottery answered the phone himself and listened. This evidence was held admissible in the prosecution of the defendant.

The cases cited in this and the previous footnote were cited in the *Rathbun* case in illustrating the conflict on the issue of the effect of consent. These cases, however, are distinguishable since an extension was utilized in none of them.

[27] 316 U.S. 129 (1942).

[28] *Id.* at 134.

[29] This is the same basis for denial of the fourth amendment contention that was propounded in the *Olmstead* case. Presumably, a trespass without a warrant would constitute an illegal "search" within the meaning of the fourth amendment and be a violation thereof, for the fourth amendment is apparently construed to prohibit either illegal search *or* seizure. United States v. Jeffers, 342 U.S. 48 (1951). Thus, the finding of a trespass may be sufficient to bring the tap within the prohibition of the fourth amendment. Of course some evidence must be obtained before the problem would arise. Even though such evidence may not be regarded as "seized" in terms of the fourth amendment, one element—the illegal search—may be sufficient to procure exclusion.

In United States v. Silverman, 166 F. Supp. 838, (D.D.C. 1958), aff'd, 275 F.2d 173 (D.C. Cir. 1960), an electronic eavesdropping device was used requiring a wire projecting several inches into the party wall. The defendant argued that there was a trespass. The district court stated at 841:

"It would be, in the opinion of the Court, almost ludicrous to draw a line of distinction between legality and illegality on such minute circumstances. Moreover, the Court does not feel that inserting a wire into a party wall actually constitutes a trespass."

[30] 88 F. Supp. 921 (S.D.N.Y. 1950).

[31] *Id.* at 924.

[32] Westin, *supra* note 11, at 180.

[33] Rosenzweig, *supra* note 4, at 552.

[34] 308 U.S. 338 (1939).

volved, and the government had simply obtained further evidence through use of the wiretapped conversations, but did not attempt to submit the substance of the communications in evidence. The Court, in the spirit of the first *Nardone* decision, held that the evidence obtained through an illegal interception may be used neither directly nor indirectly. However, if it can be shown that the evidence was independently obtained, it will be admissible, even though a wiretap has taken place.[35] The opinion, delivered by Mr. Justice Frankfurter, cited *Silverthorne Lumber Co. v. United States*,[36] in which the Court had held that derivative evidence must be excluded when the original source of such evidence was obtained in violation of the fourth amendment. Thus, on the suject of derivative evidence, the fourth amendment and Section 605 were held to be co-extensive.

An attempt to determine what constitutes forbidden use of derivative evidence necessitates a review of cases based upon the rationale of the second *Nardone* decision.[37]

In *Monroe v. United States*,[38] it was held that use of recordings to refresh the memory of one of the conversants was not error irrespective of whether the recording was an interception within the meaning of Section 605. It has been suggested that this use of such evidence is not a violation of the spirit of the second *Nardone* case because the ostensible purpose of the exclusionary rule is the prevention of violations of the Act and it is highly unlikely that illegal taps will be made with the object of using them to refresh a conversant's recollection.[39] In addition, this is not derivative evidence in the sense that the witness' testimony is derived through the wiretap evidence, unless the witness was discovered as a result of the wiretap.[40]

One prosecution use of illegally tapped conversations which has caused difficulty is the attempt to persuade a party or person alluded to in the conversation to become a government witness. This was the situation in *Weiss v. United States*.[41] The Court, in excluding the testimony, held that lawful consent to divulgence must be voluntary and not coerced.

In the *Weiss* case, the defendant was a party to the tapped conversation which was sought to be used indirectly by the prosecution. However, in *Goldstein v. United States*[42] the defendant against whom such induced testimony was used was not a party to the conversation. Using the fourth amendment decisions as their guide, the Court in *Goldstein*

[35] It is not reversible error to admit the wiretapped evidence if it is merely cumulative, as where a recording and one of the conversants' testimony are both admitted in evidence. United States v. Reed, 96 F.2d 785 (2d Cir. 1938), *cert. denied*, 305 U.S. 612 (1938).

[36] 251 U.S. 385 (1920).

[37] Another aspect of the "divulgence" problem is the relation between the federal government and the states in obtaining and admitting wiretapped evidence in a judicial proceeding. It has been held that the exclusionary rule imposed by the first *Nardone* interpretation of Section 605 is not imposed upon the state courts. Schwartz v. Texas, 344 U.S. 199 (1952).

[38] 234 F.2d 49 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 872, *rehearing denied*, 352 U.S. 937 (1956).

[39] Bernstein, *supra* note 24, at 105.

[40] Thus, derivative evidence may be defined as that evidence which is originally obtained *through* use of the wiretap. A collateral use such as refreshing a witness' memory is not a derivative use of the wiretap. It may be noted that where wiretap evidence was obtained and used in a prosecution prior to 1934 (the date of passage of the Federal Communications Act), a republication of such evidence in a post 1934 trial is not a violation of Section 605. United States v. Costello, 247 F.2d 384 (2d Cir. 1957). After passage of Section 605, presumably each divulgence would constitute a violation, although there seems to be no authority on the issue.

A recording of an illegally wiretapped conversation is inadmissible in court even for the purpose of impeaching a witness. James v. United States, 191 F.2d 472 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 948 (1952).

[41] 308 U.S. 321 (1939). This decision was handed down the same day as the second *Nardone* case. Another troublesome question laid to rest by the *Weiss* decision was whether Section 605 was applicable to *intra* as well as *inter*state communications. Several circuit courts had held that the statute was inapplicable to intrastate communications. Valli v. United States, 94 F.2d 687 (1st Cir. 1938); United States v. Bruno, 105 F.2d 921 (2d Cir. 1939). Other circuit courts concluded that intrastate communications were also within the purview of Section 605, Sablowsky v. United States, 101 F.2d 183 (3d Cir. 1938); Diamond v. United States, 108 F.2d 859 (6th Cir. 1938). In rejecting the government's contention, the Supreme Court held that Section 605 must be construed to apply to *intra* as well as *inter*state communications. The basis of this decision was the fact that the two clauses of §605 which the Court regarded as relating to wiretapping, (*i.e.*, the second and fourth clauses), used the terms "any communication" and "such communication", whereas the other clauses referred to "interstate and foreign communications". The Court concluded that this use of language must have been intended to include intrastate wiretapping. There was sound policy underlying this theory. It is virtually impossible to separate *intra* from *inter*state calls in the wiretapping process. Westin, *supra* note 11, at 176.

The Court was undoubtedly correct in its interpretation of the statute, not because Congress foresaw the difficulty in identifying intrastate phone calls, but because the intended subject of the Act was the telegraph system, a subject clearly of interstate character.

It has been suggested that the only telephone communications now beyond the coverage of the Act are those of the intraoffice variety, over which Congress could have no authority. Rosenzweig, *supra* note 4 at 542.

[42] 316U.S. 114 (1942).

concluded that a person could not assert another's rights under the statute, even for his own benefit.[43]

Mr. Justice Murphy, joined by Mr. Justice Frankfurter in dissenting, pointed out that the majority's decision was inconsistent with the second *Nardone* case. The dissenters insisted that the policy underlying the *Nardone* case was a prevention of the use of illegally obtained evidence. Therefore, it should be immaterial who objects to the introduction of such evidence. The majority of the Court, however, balked at extending the statutory protection beyond the protection afforded by fourth amendment cases. In so doing, it lost sight of the divergent purposes of the provisions. The fourth amendment was designed to protect a personal right, while Section 605, by the Court's own interpretation, protects the means of communication, rather than the individual.[44] The statute does not create a personal right or privilege, and therefore assertion of a violation of Section 605 should not be limited solely to a participant in the tapped conversation.

Another facet of the second *Nardone* case was the procedure it provided for discovering the use of derivative evidence. In order to save time at the trial, there was to be a pretrial hearing. No motion to suppress would be allowed during the trial unless the defendant had had no earlier opportunity to make such a motion.

The Court defined the approach as follows:

> "The burden is . . . 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 . . . to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree."[45]

Thus the so-called "Nardone hearings" were born. Subsequent courts, however, have found the procedure extremely difficult to apply.

The defendant's first burden is showing that a wiretap in fact took place. This, in itself, is often extremely difficult. The defendant may be completely unaware that his telephone had been tapped. Circumstantial evidence of tapping is insufficient.[46] Although some federal courts seem to place a heavier burden upon the defendant than others, generally the motion for a hearing must request suppression of specific evidence.[47] Even where a former hearing has led to the suppression of derivative evidence, the court may refuse to grant a hearing in a subsequent prosecution unless the defendant can show that a substantial part of the new indictment is based upon the evidence formerly suppressed.[48] Denial of a motion for preliminary hearing does not prejudice the right of the defendant to object to the admission of evidence during the trial, if it appears at that time to be the product of illegally intercepted messages.[49]

If the defendant is successful in establishing the fact of the wiretap, the burden shifts to the prosecution to show that the evidence to be presented had an origin independent of the wiretap. The fact that identical evidence was obtained by both legal and illegal methods will not prevent admission of the former.[50] In order to prove an independent source the prosecution must usually reveal the evidence to be used at the trial thereby damaging its planned trial strategy.[51]

It has been suggested that this problem may be circumvented by requiring the prosecution to submit a summary of evidence and a statement of its source to the trial judge. Only the evidence which the judge concludes might be tainted would be revealed to the defendant. This procedure would not

[43] A person may not assert another's constitutional right against illegal search and seizure. Ingram v. United States, 113 F.2d 966 (9th Cir. 1940). The *Goldstein* holding was contrary to dictum of an earlier Court of Appeals decision. United States v. Bernava, 95 F.2d 310 (2d Cir. 1938).

[44] Goldman v. United States, 316 U.S. 129, 133 (1942), handed down the same day as the *Goldstein* case pointed out that, "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation."

[45] 308 U.S. 338, 341 (1939).

[46] Price, *The Admissibility of Wiretap Evidence in the Federal Courts*, 14 U. MIAMI L. REV. 57, 69 (1959).

[47] An affidavit filed by the government to the effect that none of the evidence was a result of wiretapping was held sufficient to deny a hearing where the defendant simply made general allegations, unsupported by proof. United States v. Frankfeld, 100 F. Supp. 934 (D. Md. 1951).

[48] United States v. Pillon, 36 F. Supp. 567 (E.D.N.Y. 1941), involved a third prosecution. In two former prosecutions government evidence had been suppressed. The court denied a pre-trial hearing, pointing out that it was highly improbable that the government would rely on incompetent evidence for the third time.

In United States v. Costello, 171 F. Supp. 10 (S.D. N.Y. 1959), the court concluded that the interception of telephone messages relating to a purely collateral matter which precipitated an investigation was not a sufficient basis for excluding admissions of his criminal activities in other fields.

[49] United States v. Frankfeld, 100 F. Supp. 934 (D. Md. 1951).

[50] United States v. Coplon, 91 F. Supp. 867 (D.D.C. 1950), *rev'd. on other grounds*, 191 F.2d 749 (D.C. Cir. 1951).

[51] Bernstein, *supra* note 24, at 100.

prevent an inquiry into the source of evidence after the trial has begun.[52]

Where the defendant proves that wiretaps have been made, the judge cannot allow them to be withheld from the defendant throughout the proceeding, even on the basis of national security. In *United States v. Coplon*,[53] the trial judge sought to so withhold evidence. However, the Court of Appeals held that the prosecution must release the contents of the wiretap and prove that its evidence was independently obtained.[54] Thus, such evidence must be revealed or the prosecution will fail.

In certain cases this may lead to an inconsistency with the requirements of the Congressional legislation[55] passed in modification of *Jencks v. United States*.[56] For example, if during the trial the defendant moves for government reports relating to a witness' testimony, and these reports relate to a wiretap, then under the *Jencks* statute the government may allege that such reports are irrelevant to the testimony. If the judge agrees, he may allow the government to withhold such reports. Presumably, in the "Nardone hearings" the government would still have the burden of showing that the evidence used was of an independent origin.

The *Coplon* case seems to require that an entire disclosure of taps and reports is essential, since the burden is on the government to show that the evidence was independently derived. Nevertheless, the express language of the *Jencks* statute would seem to prevail over the case law in relation to the "Nardone hearings," since the former is a legislative directive.

In 1941, two years after the second *Nardone* decision, the Department of Justice announced its rather startling position that since it considered itself a unity, divulgence of wiretapped conversations within the Department was not a divulgence within the meaning of Section 605.[57] There has never been a legal test of this view, although it is still endorsed by the Justice Department. This interpretation seems to ignore the literal language of the statute in forbidding publication to "any person." If the Court were to technically construe "divulgence" as they have "interception", the Justice Department's position would be untenable.[58]

As a corollary of the Justice Department's interpretation of Section 605, prosecutions of private persons under the penal provision of the Federal Communications Act[59] for violation of Section 605 have been rare. There seems to have been no reported prosecution of a police officer for such violation. This situation is not surprising when it is noted that the Department of Justice itself engages in wiretapping and might be expected to hesitate in prosecuting for activities in which it is also involved.[60] Until 1957 there had been only one

[52] *Id.* at 101.

[53] 185 F.2d 629 (2d Cir. 1950).

[54] *Id.* at 637. The government might refuse to reveal the information on the ground that such divulgence would constitute a violation of Section 605. However, such a disclosure seems not to be so regarded by the Court.

[55] "(b) After witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . .
(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. . . . the court shall excise the portions . . . which do not relate to the . . . testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. . . .
(d) If the United States elects not to comply with an order of the court . . . the court shall strike from the record the testimony of the witness. . . ." 71 Stat. 595 (1957), 18 U.S.C. §3500 (1958).

[56] 353 U.S. 657 (1956). Under the terms of the statute the issue would arise only during the trial. An examination of its legislative history seems to indicate that this statute was not considered in relation to such situations. 1957 U.S. CODE CONG. & AD NEWS 1861.

[57] This view has consistently been held. However, the incidence of wiretapping by various bureaus has been sporadic. For a history of the fluctuation of the Justice Department policy see: Helfeld, *A Study of Justice Department Policies on Wire Tapping*, 9 LAW. GUILD REV. 57 (1949); Rogers, *The Case for Wire Tapping*, 63 YALE L. J. 792 (1954); Brownell, *Public Security and Wire Tapping*, 39 CORNELL L. Q. 195 (1954). The Treasury Department apparently holds a contrary view, Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 YALE L. J. 802 (1954).

[58] There is some dictum, however, supporting the position of the Justice Department: "It seems to the Court that obviously the deputy marshal did not use the conversation for his own benefit. The phrase 'for the benefit of another' naturally means for another person. I do not think this included the Government, and for that reason I do not believe that this clause is applicable." United States v. Lewis, 87 F. Supp. 970, 974 (D.D.C. 1950).
In addition to interception and divulgence the Act forbids the unauthorized "use" of information obtained by wiretapping. If the government indulges in wiretapping, it is logical to assume that it will in some way use the information. This, too, would be in violation of the statute.

[59] 48 Stat. 1100 (1934), 47 U.S.C. §501 (1958), provides for prosecution of violations of the Act and upon conviction imposes a fine of not more than $10,000 and/or imprisonment for a term not exceeding one year.

[60] Donnelly, *supra* note 57, at 802; Helfeld, *supra* note 57 at 60. United States v. Hoffa, 156 F. Supp. 495