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. 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. 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.

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. 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. 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 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. Holmes' now

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).
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."  

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.  

It has been suggested that the Olmstead decision was based primarily upon policy considerations.  
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.  

During this period, law enforcement agencies utilized the freedom afforded by the Court to full advantage. 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.  
The case, Nardone v. United States, 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."  

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-


[Vol. 51  

10 47 F.2d 843 (6th Cir. 1933).  
11 In Beard v. United States, 67 F.2d 556 (D.C. Cir. 1933), 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.

12 302 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, 566 (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).

tion was also rejected, again upon the exact language of the statute.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{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."\textsuperscript{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.\textsuperscript{21} This divergence of views prompted the Supreme Court to grant certiorari in Rathbun v. United States.\textsuperscript{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.\textsuperscript{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.\textsuperscript{24}

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

\textsuperscript{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).

\textsuperscript{17} Supra note 13.

\textsuperscript{18} Nardone v. United States, 302 U.S. 379 (1937) intimidate 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.

\textsuperscript{19} 112 F.2d 888 (2d Cir. 1940).

\textsuperscript{20} Id. at 889.
is a regularly used extension or whether the exten-
sion is installed for the purpose of listening to a
specific conversation would not seem to be a ra-
tional 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 volun-
tarily 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 situa-
tions, i.e., where electronic devices which require
no direct contact with telephone equipment are
used. Generally, where a police officer listens with-
out the aid of an extension or wiretap device, the
use of such evidence is not regarded by the courts
as a violation of Section 605.26 Even where the con-
sent of neither party is obtained, such evidence
has been held admissible.26 This pattern of the
courts’ decisions in defining interception is not sur-
prising 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 detectophone
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 eviden-
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 diffi-
culty 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 ex-
cuded evidence upon the basis that admission
would constitute a divulgence which the statute
prohibited. In 1939 a second Nardone case34 reached
the Supreme Court. The same defendants were in-
cluded in the second 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 con-
structed 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 re-
garded 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), 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 dis-

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 re-
ceiver’s end and at his instigation. However, in United
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 independ-
ent 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.

24 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 con-
versation. The court allowed the evidence thereby ob-
	ained to be admitted. In Billed 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
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. It may be noted that where wiretap evidence was obtained and memory is not a derivative use of the wiretap. It may be evidence which is originally obtained in a judicial proceeding. It has been held that the exclusionary rule is the prevention 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. 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.

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. 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 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

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). 251 U.S. 385 (1920).

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 (1932).


Bernstein, supra note 24, at 105.

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 (1st Cir. 1951), cert. denied, 342 U.S. 948 (1952).

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 interstate 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. 1939); 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 interstate 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 interstate 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. Rosznweig, supra note 4 at 542.

316 U.S. 114 (1942).
concluded that a person could not assert another's rights under the statute, even for his own benefit. A

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. 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." Therefore 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. 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. 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. 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.

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. 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.

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

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 Goldman holding was contrary to dictum of an earlier Court of Appeals decision. United States v. Bernava, 95 F.2d 310 (2d Cir. 1938).

Goldman v. United States, 316 U.S. 129, 133 (1942), handed down the same day as the Goldman 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." 42


43 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).

44 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.

45 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.


48 Bernstein, supra note 24, at 100.
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 conversa-
tions within the Department was not a divulgence
within the meaning of Section 605.77 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 un-
tenable.56

As a corollary of the Justice Department's in-
terpretation of Section 605, prosecutions of private
persons under the penal provision of the Federal
Communications Act59 for violation of Section 605
have been rare. There seems to have been no re-
ported prosecution of a police officer for such vi-
olation. This situation is not surprising when it is
noted that the Department of Justice itself en-
gages 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

67 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 De-
partment 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
Department apparently holds a contrary view, Don-
nelly, *Comments and Caveats on the Wire Tapping Con-

68 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/or imprisonment for a term not exceeding one year.

1957 U.S. CODE CONG. & AD NEWS 1861.