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Admissibility in the Federal Courts of Evidence Obtained by Eavesdropping through the Use of Communication Devices

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NOTES

ADMISSIBILITY IN THE FEDERAL COURTS OF EVIDENCE OBTAINED BY EAVESDROPPING THROUGH THE USE OF COMMUNICATIONS DEVICES[1]

In general, the purpose of this note is to discuss the admissibility in the federal courts of evidence secured by federal law enforcement officials by eavesdropping, through the media of mechanical and electrical devices which have been placed on or near the premises of the accused. The problem lends itself well to the historical approach. The note will begin with a brief analysis of the common law, then will consider federal court decisions rendered prior to the enactment of the Federal Communications Act of 1934, followed by a study of the federal court decisions under this Act, and will conclude with a somewhat speculative treatment of the application of the federal law to the State of Wyoming.

1. Illustrative of such mechanical and electrical devices are detectaphones, dictaphones, vacuum tubes, induction coils, microphones, wire, tape and a sound recorders, telephone extension lines, and "walky-talkies."

I

AT COMMON LAW

At common law, although evidence may have been illegally taken from the possession of the party against whom it was offered, or otherwise unlawfully obtained, this was no valid objection to its admissibility if it was relevant to the issues "the court will not take notice how it was obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."[2] The reason underlying the rule seems to have been that since the objective of the judge and jury is to get at the truth, all relevant evidence should be admitted. For example, a trespasser may testify to pertinent facts observed by him, or he may put in evidence pertinent articles found by him while trespassing; but for the trespass he may be held liable in a civil suit. Moreover, evidence obtained by eavesdropping, although an offense at common law, was nevertheless admissible if relevant.[3]

The common law rule has been modified in the United States courts to the extent only of excluding evidence, in a civil or criminal case, which is procured by federal officers in violation of the Fourth and Fifth Amendments[4] to the Constitution of the United States. This common law rule, as modified, is still the prevailing rule in the federal courts. When federal officers violate the Fourth or Fifth Amendments to get at the truth, the federal courts refuse to admit evidence so obtained, regarding the upholding of the constiutional guaranties against abuse of governmental power as more important in such circumstances than the discovery of the truth.[5] But, since the protection to the individual under the Fifth Amendment is "from any disclosure sought by legal process against him as a witness,"[6] seldom is the Fifth Amendment, standing alone, invoked in this type of case as a bar to the admission of such evidence. Thus the problem in its commonest form stems from this principle: that according to the common law as modified in the federal courts, where the unlawful procurement consists of a violation of the Fourth Amendment, the illegality of the search will exclude the evidence so obtained.

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2. 1 Greenleaf on Evidence 254 a (15th ed. 1892); See also Olmstead v. United States, 277 U.S. 467, 48 S. Ct. 569, 72 L. Ed. 944, 66 A.L.R. 385 (1928); 8 Wigmore on Evidence sec. 2184 b (3d ed. 1940); United States v. Scottie, 102 F. Supp. 747, 750 (DCSD Texas 1950).
3. For general support of this and the previous proposition see Commonwealth v. Tibbets, 157 Mass. 519, 32 N.E. 910, 911 (1893); Commonwealth v. Dana, 2 Metc. 329, 337 (Mass. 1841); People v. Adams, 176 N.Y. 351, 68 N.E. 636, 638 (1903); Williams v. State, 100 Ga. 511, 28 S.E. 624, 625 (1897). On the admissibility of evidence secured through eavesdropping, see People v. Cotta, 49 Cal. 166 (1874).
4. The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Amendment reads: ". . . nor shall (any person) be compelled in any criminal case to be a witness against himself. . . ."
Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 532, 29 L. Ed. 746, 751, 752 (1886); Brady v. United States, 300 F. 540, 541 (CCA 6th 1924).
6. United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 1251, 88 L. Sd. 1542 (1944).

II

DECISIONS PRIOR TO THE COMMUNICATIONS ACT OF 1934

With the invention of modern communications devices which enable an eavesdropper secretly to overhear and record conservations, the common law rule began to undergo modification. The question of whether or not wire tapping (a form of eavesdropping by mechanical means) constitutes an unlawful search and seizure within the meaning of the Fourth Amendment to the Constitution of the United States was first presented in the leading case of *Olmstead v. United States*,[7] in which case the Supreme Court held that wire tapping does not constitute an unlawful search and seizure.

As is characteristic of practically all areas of constitutional law, the Supreme Court was confronted with the problem of balancing interests and weighing values; in this case, the individual's right to privacy against the need for effective detection of criminals. The following excerpts and paraphrases can serve to illustrate the judicial reasoning on both sides of the question. Although four of the justices vigorously dissented, the majority of the court held[8] that:

> "Here we have testimony only of voluntary conversations secretly overheard. The Fourth Amendment itself shows that the search is to be of tangible material things—the person, the house, his papers, or his effects. The warrant calls for a description of the things to be seized. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the sense of hearing and that only. There was no entry of the houses or offices of defendants. . . .
>
> "Nor can we, without the sanction of Congressional enactment, agree that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore."

It makes no difference in a federal prosecution, said the Supreme Court in the *Olmstead* case, that the statute of the state makes it unlawful to intercept a message over a telephone line.[9] Under the majority view, then, the search and seizure provisions of the Fourth Amendment to the Federal Constitution inhibited only the taking of *tangible* things and did not preclude testimony concering voluntary conversations secretly overheard. Wire tapping is neither unconstitutional, nor a federal crime, and evidence so obtained is admissible in federal courts regardless of state penal laws making wire tapping an offense.

7. Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376 (1928).
8. Ibid., 277 U.S. at 464, 468.
9. Ibid., 277 U.S. at 469.

Mr. Justice Brandeis, writing for the dissenters, warned that:

> ". . . If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself. . . ."[10]
>
> " 'It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right to personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense. . . .' "[11]
>
> "Every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth Amendment."[12]

The dissenting justices, therefore, felt that the expression of thought into speech, as contrasted with the expression of thought into writing, should not divest the utterer of the constitutional protection of the Fourth Amendment.

Prior to the enactment of the Federal Communications Act of 1934, it was held in some seven Courts of Appeal cases[13] that evidence was not rendered inadmissible in a criminal prosecution in a federal court by the fact that it was obtained by wire tapping. In two of these cases (as in *Olmstead*) the wire tapping by which the evidence was obtained constituted a violation of the penal laws of the state.[14] In *Foley v. United States,* after holding that a person was not entitled to have a search warrant quashed and evidence obtained thereunder suppressed on the ground that the information constituting the probable cause for the issuance of the warrant was obtained by tapping a telephone line and intercepting messages without consent, the court stated: ". . . it is settled that the surreptitious eavesdropping of federal officers by secretly tapping telephone wires is no worse than other eavesdropping, and does not require the discarding of the information secured."[15] Similarly, where one of several co-conspirators called defendant by telephone and talked with him in the presence of a government officer, who recognized defendant's voice and heard the conversation was admissible.[16]

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10. Ibid., 277 U.S. at 485.
11. Ibid., 277 U.S. at 474, 475.
12. Ibid., 277 U.S. at 478.
13. Dowdy v. United States, 46 F. 2d 417 (CCA 4th 1931); Kerns v. United States, 50 F.2d 602 (CCA 6th 1931); Morton v. United States, 60 F. 2d 696 (CCA 7th 1932); Foley v. United States, 64 F. 2d 1 (CCA 5th 1933); Bushouse v. United States, 67 F. 2d 843, 844 (CCA 6th 1933); Beard v. United States, 65 App. D.C. 231, 82 F. 2d 837 (1936); Valli v. United States, 94 F. 2d 687 (CCA 1st 1938).
14. Morton v. United States, 60 F. 2d 696, 700 (CCA 7th 1932); Valli v. United States, 94 F. 2d 692 (CCA 1st 1938).
15. Foley v. United States, 64 F. 2d 1, 4 (CCA 5th 1933).
16. Dowdy v. United States, 46 F. 2d 417 (CCA 4th 1931).

III

UNDER SECTION 605[17] OF THE FEDERAL COMMUNICATIONS ACT OF 1934

A. THE SUPREME COURT TURNS AWAY FROM THE OLMSTEAD CASE

The same policy problems as treated in the *Olmstead* case are still present after the enactment of the Federal Communications Act. Section 605 is a somewhat feeble embodiment of what the majority of the court in the *Olmstead* case had reference to when it said: "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence."[18] It, therefore, comes as somewhat of a surprise that despite the enactment of Section 605, the federal courts at first continued to follow the position taken by the Supreme Court in the *Olmstead* decision. Quite significantly, in *Smith v. United States,*[19] decided after the passage of Section 605, the court denied, on the authority of *Olmstead v. United States,* a contention that evidence secured by wire tapping was inadmissible under Section 605; the court seemingly regarding Section 605 as of no more effect than a state criminal statute forbidding wire tapping. Likewise, in *Beard v. United States,*[20] the court followed the *Olmstead* case in holding that evidence secured by wire tapping was admissible against defendant, charged with a gaming offence.

But this reaffirmation was to be short-lived; for in *Nardone v. United States*[21] the Supreme Court decided that Section 605 of the Federal Communications Act applies to officers of the federal government, as well as other persons, and renders inadmissible in a criminal trial in a federal court evidence procured by such officers by tapping telephone wires and intercepting messages. The Court stated:

> "Taken at face value, the phrase 'no person' comprehends Federal agents, and the ban on communication to 'any person' bars testimony to the contents of an intercepted message. . . . To recite the contents of a message in testimony before a court is to divulge the message."[22]

The government urged the court to construe Section 605 so as to exclude federal agents, arguing that it was improbable that Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The Court replied that the question was one of policy:

> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should

17. 47 U.S.C.A. sec. 605 reads in part as follows: ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the meaning of such intercepted communication to any person. . . ."
18. Olmstead v. United States, 277 U.S. at 465, 466.
19. Smith v. United States, 67 App. D.C. 251, 91 F. 2d 556 (1937).
20. Beard v. United States, 65 App. D.C. 231, 82 F. 2d 837 (1936).
21. Nardone v. United States, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937).
22. Ibid., 302 U.S. at 381.

> resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same consideration may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments to the Federal Constitution."[23]

On the second appeal[24] of the *Nardone* case, the Court held that Section 605 rendered inadmissible not only evidence of conversations by telephones obtained by wire tapping, but also evidence procured or made accessible by the use of information so obtained. The Court declared:

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent' with ethical standards and destructive of liberty."[25]

As a result of the two *Nardone* decisions, the Supreme Court seems to have laid down a new doctrine which embraces the views of the four dissenting justices in the *Olmstead* case. The Court seemed to consider the time ripe for placing a harness upon what many believed to be a "dirty business." These *Nardone* decisions represent a shift in the weighing of those values discussed above. Now the scales were tipped against the threat of government wire tapping and in favor of the preservation of the individual's rights to privacy.

But even after the first *Nardone* decision, other ways were invoked for avoiding the proscription of the newly planted doctrine. Thus, in *Valli v. United States,*[26] intercepted messages of intrastate calls were held admissible. In *United States v. Bonanzi,*[27] the court intimated that intrastate communications would be admissible. Similarly, in *United States v. Bruno,*[28] the admissibility of intrastate communications was given as an alternative ground of decision.

A contrary result was reached in *Diamond v. United States,*[29] *Sablowsky v. United States,* and *United States v. Plisco*; in each of these cases evidence relating to intercepted intrastate communications was excluded. In the *Sablowsky* case, holding that Section 605 applied to intrastate communications as well as to interstate messages, the court stated:[30]

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23. Ibid., 302 U.S. at 383.
24. Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939). The following passage is useful to illustrate the procedural requirement set out by the Court: "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire tapping was unlawfully employed. Once that is established the trial judge must give opportunity to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the government to convince the trial court that its proof had an independent origin."
25. Ibid., 308 U.S. at 340.
26. Valli v. United States, 94 F. 2d 687, 691 (CCA 1st 1938).
27. United States v. Bonanzi, 94 F. 2d 570, 572 (CCA 2d 1938).
28. United States v. Bruno, 105 F. 2d 921, 923 (CCA 2d 1939); subsequently reversed on other grounds, 308 U.S. 287, 60 S. Ct. 198, 84 L. Ed. 257 (1939).
29. Diamond v. United States, 108 F. 2d 859, 860 (CCA 6th 1938).
30. Sablowsky v. United States, 101 F. 2d 183, 191 (CCA 3d 1938).

> ". . . the ethical problem with which Congress was engaged and which it apparently sought to solve by enacting Section 605 is identical, whether the communication intercepted and offered in evidence be interstate or intrastate in character. Nor would an interpretation of that section commend itself to reason whereby certain intercepted communications could be received in evidence while others procured through the medium of an identical tapped line would be inadmissible."

And in *United States v. Plisco,* the court declared:[31]

> ". . . The ethical considerations that support the policy of excluding intercepted interstate messages in the District of Columbia would seem to apply with equal force to intercepted local messages."

Thus, there was a conflict of decisions in the lower federal Courts of Appeals with regard to the admissibility of evidence secured by intercepting intrastate communications. An authoritative determination of this matter was finally made by the United States Supreme Court in *Weiss v. United States,*[32] where the government sought to introduce intercepted intrastate communications as evidence. The Supreme Court ruled that the interdiction of Section 605 was not limited to interstate and foreign communications, but also rendered incompetent in a federal court evidence obtained by the interception of intrastate communications. It reasoned that "any communication" of necessity encompassed local communications, because of the difficulty in dissecting interstate from intrastate communications, since both types of communication extend over the same lines.[33] The Court further ruled that voluntary testimony by one of the defendants to the effect that the recording was correct, did not bring the case within the exception in the statute for divulgence "authorized by the sender."

This apparently conclusive judicial determination against the use of evidence obtained by the federal government by wire tapping was further reinforced by subsequent decisions.[34] In *United States v. Polakoff,*[35] the Court strongly asserted that the consent to a recording of the conversation, given by the party originating a telephone call, is not a divulgence within the "consent exception" of Section 605. According to this case, although there is no physical interruption of the circuit, a telephone conversation is

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31. United States v. Plisco, 22 F. Supp. 242, 244 (DC Dist. Col. 1938).
32. Weiss v. United States, 308 U.S. 321, 60 S. Ct. 269, 84 L. Ed. 298 (1939).
33. Ibid., 308 U.S. at 327, 328.
34. United States v. Bernava, 95 F. 2d 310 (CCA 2d 1938); United States v. Reed,. 96 F. 2d 785 (CCA 2d 1938); Sablowsky v. United States, 101 F. 2d 183 (CCA 3d 1938); United States v. Klee, 101 F. 2d 191 (CCA 3d 1938); Diamond v. United States, 108 F. 2d 859 (CCA 6th 1938); United States v. Plisco, 22 F. Supp. 242 (DC Dist. Col. 1938); United States v. Jenello, 102 F. 2d 587 (CCA 3d 1939); United States v. Polakoff, 112 F. 2d 888, 134 A.L.R. 607 (CCA 2d 1940); United States v. Fallon, 112 F. 2d 894 (CCA 2d 1940); United States v. Weiss, 34 F. Supp. 99 (DSCD N.Y. 1940); United States v. Pillon, 36 F. Supp. 567 (DCED N.Y. 1941); James v. United States, 191 F. 2d 472 (CA Dist. Col. 1951); Coplon v. United States, 191 F. 2d 749 (CA Dist. Col. 1951); United States v. Flynn, 103 F. Supp. 925 (DCSD N.Y. 1951), by implication; United States v. Frankfeld, 100 F. Supp. 934 (DCD Md. 1951), by implication.
35. United States v. Polakoff, 112 F. 2d 888, 889, 134 A.L.R. 607 (CCA 2d 1940).

"intercepted" within the meaning of Section 605 where it is recorded by a device attached to an extension telephone. Since it is impossible satisfactorily to dissect a conversation, the privilege is mutual, so that both parties must consent to the interception of any part of the conversation to be within the exception of Section 605. This case was followed in *United States v. Fallon.*[36]

B. THE SUPREME COURT TURNS BACK TOWARD THE OLMSTEAD CASE

Beginning with the case of *United States v. Yee Ping Jong,*[37] there is once again the reconsideration and the re-weighing of values, with the pendulum swinging gradually back toward the *Olmstead* ruling, and a not too inconsistent steering away from the declaration in the *Nardone* case. In the *Yee Ping Jong* case the Court received evidence of a phonographic record of a conversation between X and Y, the latter being a Chinese interpreter and informer used by A, a government agent, in his investigation. At A's direction, Y called X on the telephone, the call being made from the house of an associate of A. The device was attached to the telephone wire inside the house and by it the conversation was recorded upon a prepared plate. The Court held, that the verb "intercept" means "to take or seize by the way, or before arrival at the destined place" (Webster's New International Dictionary, 2d Ed.), and does not aptly refer to a communication which has reached its intended destination and is recorded at one end of the line by one of the participants or by his direction.[38] The Court recognized that reasons of policy justify the making of telephone communications privileged for the two parties involved; but do not justify making them so privileged to one party as against use by the other. By holding that "intercept" means to take or seize by the way, or before arrival at the destined place, the Court seemed to whittle down the objection to wire tapping as a logical development of the feeling against unlawful search and seizure.

Three years later, in *Goldstein v. United States,* the Supreme Court held[39] that:

> "Even though use by prosecuting officers of intercepted telephone communications to induce witnesses to testify for the prosecution were a violation of Section 605, this would not render testimony so procured inadmissible against one not a party to the communications. . . . Section 605 is intended to protect only the sender of a message against divulgence thereof."

In short, the Court held that one not a party to tapped conversations has no standing to object to their use by the government to secure evidence. According to the Court, assertion of the right under Section 605 is a per-

36. United States v. Fallon, 112 F. 2d 894 (CCA 2d 1940).
37. United States v. Yee Ping Jong, 26 F. Supp. 69 (DCWD Pa. 1939).
38. Ibid., 26 F. Supp. at 70.
39. Goldstein v. United States, 316 U.S. 114, 122, 62 S. Ct. 1000, 1004, 86 L. Ed. 1312 (1942).

sonal right, similar to the assertion of the personal and constitutional right to protection against unreasonable search and seizure, or against self-incrimination. Clearly, this result limits the effect of the *Nardone* ruling, since the second *Nardone* decision literally outlawed the derivative use of wire tapping.

In two other cases, *Goldman v. United States* and *Shulman v. United States,*[40] decided in the same year as the *Goldstein* case, wherein the prosecution was for conspiracy to violate the Bankruptcy Act, it was held that recordings of defendant's conversation into a telephone receiver, obtained by federal officers with the aid of a detectaphone (a super sensitive auditory device) placed on the wall of an adjoining room, violated neither Section 605 nor the Fourth Amendment. Contrary to the tenor of the *Nardone* decisions, the Court took the view that the protection intended and afforded by Section 605 is of the *means* of communication and not of the *secrecy* of the conversation. The Court reasoned that words spoken in a room in the presence of another into a telephone receiver do not constitute a "communication" by wire under Section 605; that "interception" under the same section indicates taking or seizing by the way or before arrival at the destined place, and does not ordinarily connote obtaining of what is to be sent before, or at the moment it leaves the possession of the proposesd sender, or after, or at the moment, it comes into possession of the intended receiver.[41] On the authority of the *Olmstead* case, the Court held that the use of a dectectaphone in such circumstances does not constitute an unreasonable search and seizure. On the authority of the *Goldstein* and *Goldman* decisions, the federal government could use wire tapped matter to induce testimony against an accused so long as he was not a party to the intercepted conversations; or by use of a dectectaphone at either end of the communication, recordings could be made and used in evidence in federal prosecutions even though the accused was a party to the conversation. The significance of the decisions cannot be overemphasized. The net effect was to weaken greatly the authority of the *Nardone* rulings, and to indicate a return to the *Olmstead* doctrine. As additional evidence of this so-called "retreat" or shift in policy, the court in *United States v. Lewis*[42] held that the action of deputy marshals in answering a number of incoming telephone calls after raiding the premises, listening to what the party calling said, and participating in the conversation did not constitute an "interception" within Section 605, so as to render the evidence obtained thereby inadmisible in a subsequent criminal prosecution. To substitute oneself for the receiver of the telephone call, said the court, is not an interception. The same result was reached in *Billeci v. United States.*[43] In

40. Goldman v. United States and Shulman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942).
41. Ibid., 316 U.S. at 133, 134.
42. United States v. Lewis, 184 F. 2d 394 (CA Dist. Col. 1950).
43. Billici v. United States, 87 App. D.C. 274, 184 F. 2d 394 (1950).

Casey v. United States,[44] it was held that Section 605 refers to communications over licensed facilities, and its protection does not cover communications which are themselves illegal; and, therefore, in a prosecution for operating a radio station without either a station or operator's license, it was not error to admit in evidence the substance of radio messages between defendants.

The most recent expression of the Supreme Court on the principal issue is in the case of *On Lee v. United States.*[45] In that case, a Chinese laundryman, suspected of selling narcotics, was visited in his shop by an old acquaintance. During the ensuing conversation the laundryman made incriminating statements which unbeknown to him were being picked up by a radio transmitter concealed on the person of the acquaintance and which were being transmitted to a government agent who was stationed outside the laundry with a receiving set. At the trial and over defendant's objection the government agent was permitted to testify as to what he heard by using the receiving set. In reaffirming the *Olmstead* and *Goldman* decisions, the Court held that the search and seizure provisions of the Fourth Amendment inhibit only the taking of tangible things and do not preclude testimony concerning voluntary conversations secretly overheard.[46] Therefore, eavesdropping on a conversastion, with the connivance of one of the parties, is not an unreasonable search and seizure, even though such eavesdropping is made possible by means of a receiver which is tuned to the microphone hidden on the person of the conniving party. Moreover, there was no violation of Section 605, since there was no interference with any communications facility which defendant was entitled to use, and defendant was not sending messages to anybody or using a system of communications within Section 605. Federal courts, said the Supreme Court, will not discipline federal law enforcement officers where there has been no violation of a federal law.[47]

What, then is the status of the law in the federal courts today with regard to our problem?[48] It would seem that eavesdropping by federal officials through the use of communications devices is not ipso facto a violation of the Fourth Amendment nor of Section 605 of the Federal Communications Act of 1934. As a matter of evidence, the federal courts have not always been consistent in their attitude toward the policy problem of whether they should be more concerned with how the evidence was obtained, or with what the evidence is. The tendency is apparently to enlarge the domain of competency, and to submit to the jury for their

44. Casey v. United States, 191 F. 2d 1, 4 (CA 9th 1951), subsequently reversed on the Solicitor General's confession of error as to the proper interpretation of the facts, 343 U.S. 808, 72 S. Ct. 999, 96 L. Ed. 924 (1952).
45. On Lee v. United States, 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 770 (1952).
46. Ibid., 72 S. Ct. at 972.
47. Ibid., 72 S. Ct. at 972.
48. For a discussion of the federal and state legislation and court decisions, of a survey of newspaper opinion of wire tapping, of wire tapping experience under the New York system, of the technical aspects of wire tapping, and of a proposed wire tapping act, see Westin, The Wire-Tapping Problem, 52 Col. L. Rev. (1952).

consideration those matters which heretofore were excluded. These methods of obtaining evidence ought to be regarded as raising, not questions of law, but questions as to which witness to believe.[49]

IV

AN EXERCISE IN SPECULATION

Would evidence obtained by Wyoming state law enforcement officers by eavesdropping by the use of induction coils, telephone extension lines, wire, tape or sound recorders, dictaphones, detectaphones, or "walky-talkies" be admissible in the Wyoming state courts in a prosecution for a state offence? The determination of this question must ultimately rest on the Wyoming Supreme Court's interpretation of a state constitutional provision and a state statute. The Fourth Amendment to the United States Constitution has been expressly incorporated and set out in the Wyoming Constitution.[50] Also, Wyoming has a statute which makes wire tapping a felony and regulates the use or disclosure of information so obtained.[51]

If the Wyoming Supreme Court were to follow the *Olmstead* doctrine, then, clearly, the evidence so obtained would not constitute an unlawful search and seizure within the meaning of the Wyoming Constitution. If, however, the Court were to hold that wire tapping constitutes an unlawful search and seizure, the Wyoming Supreme Court has already indicated that the evidence illegally obtained would be inadmissible because the admission of such evidence would violate the state constitutional provision protecting one against self-incrimination.[52] The majority of state court decisions on this question in other states, in the absence of statute, seem to follow the view of the majority in the Court in *Olmstead v. United States* to the effect that evidence that is otherwise competent is not rendered inadmissible by the fact that it was obtained by means of wire tapping or intercepting communications.[53] As evidence of the majority state view,

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49. On Lee v. United States, 343 U.S. 747, 72 S. Ct. at 974 (1952).
50. Wyo. Const. Art. I, Sec. 4 reads: "The right of the people to be secure in their houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized."
51. Wyo. Comp. Stat. 1945 sec. 9-1921 reads as follows: "Whoever shall wilfully and maliciously . . . tap, or make any connection with, or read, or copy by use of telegraph or telephone instruments, or otherwise, in any unauthorized manner, any message . . . from any telegraph or telephone line, wire or cable, so unlawfully . . . tapped in this state; or make unauthorized use of the same, or who shall wilfully and maliciously prevent, obstruct, or delay, by any means of contrivance whatsoever, the sending, conveyance, or delivery, in this state, of any authorized communication . . . by or through any telegraph or telephone line, cable, or wire, under the control of any telegraph or telephone company doing business in this state; or who shall wilfully and maliciously aid, agree with, employ, or conspire with any other person to do any of the aforementioned unlawful acts . . . shall be deemed guilty of a felony, punishable by a fine of not less than fifty dollars ($50.00) nor more than five-hundred dollars ($500.00) or by imprisonment in the penitentiary for not more than five (5) years or both."
52. State v. Peterson, 27 Wyo. 185, 194 Pac. 342, 13 A.L.R. 1284 (1920).
53. See Note, 134 A.L.R. 614 (1941).

the court in *Adams v. New York* cited Greenleaf with approval, to the effect that the admissibility of documentary evidence tending to establish the guilt of an accused of the offense charged is not affected because it was obtained in violation of the constitutional prohibition against unreasonable search and seizure.[54]

In more than one instance Section 605 has been held not to apply to prosecutions in state courts.[55] Although the Wyoming statute forbidding wire tapping is located in a chapter of the state code dealing with crimes labelled "Offences Against Public Utilities," it has been held in other states[56] having statutes similar to that of Wyoming, that such statutes are designed to protect the secrecy of communications and the subscriber's right of privacy. In Arizona, where a statute[57] similar to that of Wyoming is operative, a state court held that the use of a dictograph to overhear conversations spoken into a telephone receiver does not violate the wire-tapping law.[58] If argument by analogy can have any validity, then the Arizona decision should at least serve as a stepping stone for the Wyoming Supreme Court. It should be noted that disclosure is not absolutely forbidden in the Wyoming statute;[59] but instead, it is only an unauthorized use of wire tapped information which is prohibited. Would a reasonable construction of the Wyoming statute allow wire tapped information to be used in the courts, or exempt state public officials? The Wyoming Supreme Court has never had occasion to enterpret the statute. Whatever interpretation may be given the statute, one thing is certain: the language of the Wyoming statute is most awkward and would be extremely difficult to apply to the modern scientific means used by eavesdroppers.[60]

GEORGE M. APOSTOLOS

POWER OF PEACE OFFICERS TO ARREST WITHOUT WARRANT IN WYOMING

The question of whether or not an arrest is lawful may be raised in a variety of ways.[1] The arrested person may apply for release from custody by writ of habeaus corpus, or bring a civil action for damages resulting

54. People v. Adams, 176 N.Y. 351, 68 N.E. 636, 638 (1903); See also Hubin v. State, 180 Md. 279, 23 A.2d 706 (1942).
55. Rowan v. State, 175 Md. 547, 3 A. 2d 753, 758 (1939); Leon v. State, 180 Md. 279, 23 A. 2d 706, 709 (1942); People v. Vertlieb, 22 Cal. 2d 193, 137 P. 2d 437, 438 (1943); People v. Kelly, 22 Cal. 2d 169, 137 P. 2d 1, 4 (1943).
56. People v. Trieber, 28 Cal. 2d 657, 171 P. 2d 1, 4 (1946).
57. Ariz. Code Ann. 1939 secs. 43-5403, 43-5405.
58. State v. Behringer, 19 Ariz. 502, 172 Pac. 660 (1918).
59. Several states, notably New York, have laws which permit the use of wire tapping pursuant to court order under a procedure similar to that required for a search warrant. New York Constitution Art. I, Sec. 12; Code of Crim. Procedure, sec. 813a.
60. For an excellent visual illustration of the use of these mechanical, electrical, and video devices by the Federal Bureau of Investigation, see the movie entitled, "Walk East on Beacon," which is currently showing nation-wide.

1. Waite, The Law of Arrest, 24 Texas L. Rev. 279 (1946).