

January 1939

Admissibility of Evidence of Intercepted Communications

Frank R. Kennedy

Follow this and additional works at: http://openscholarship.wustl.edu/law_lawreview



Part of the [Law Commons](#)

Recommended Citation

Frank R. Kennedy, *Admissibility of Evidence of Intercepted Communications*, 24 WASH. U. L. Q. 256 (1939).

Available at: http://openscholarship.wustl.edu/law_lawreview/vol24/iss2/14

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Article X of the Constitution, constitutional provisions, statutes, and legal maxims are seen to have influenced the courts' final determinations. Among these competing rules, some must give way since, by their very nature, not all can be applied. Defects and gaps have resulted. The most serious one perhaps is the inability of the legislature to levy a graduated or classified property tax based upon reasonable and justifiable considerations. The only remedy would appear to lie in a constitutional amendment since there is little room to doubt that Section 3 has failed to and can no longer accomplish this end and that Section 4 prevents such legislative action.

M. J. GARDEN.†

ADMISSIBILITY OF EVIDENCE OF INTERCEPTED COMMUNICATIONS

At common law the admissibility of evidence is not affected by the illegality of the means by which it is obtained.¹ The illegality is not condoned but ignored, because such a collateral issue can not be raised at the trial and because it in no way affects the probative value of the evidence.² The remedy for invasion of the immunity against illegal seizure of evidence is a suit for damages against the searching officer³ or a prosecution for criminal contempt.⁴

The right to personal security and privacy of the home as

† Member of the St. Louis Bar.

1. *Jordan v. Lewis* (K. B. 1740) 2 Stra. 1122, 93 Eng. Rep. 1072, 104 Eng. Rep. 618; *Commonwealth v. Dana* (Mass. 1841) 2 Metc. 329, 337; *Adams v. New York* (1904) 192 U. S. 585; 5 Jones, *Evidence* (2d ed. 1926) 3865-83, secs. 2075-6, 2080. It appears that at least twenty-six states still follow the original common-law rule in its original vigor. *Wigmore, Evidence* (2d ed. Supp. 1934) 920-950, secs. 2183-4 and notes. Arkansas and Kansas are among these states. *Knight v. State* (1926) 171 Ark. 882, 286 S. W. 1013; *State v. Johnson* (1924) 116 Kan. 58, 226 Pac. 245.

2. Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 Minn. L. Rev. 1. Fraenkel asserts that the theory of the first ground is untenable. He points out that collateral inquiry has always been allowed where a confession has been attacked as improperly obtained. The competency of witnesses is often the subject of collateral inquiry. The objection may also be obviated by motion before trial for return or suppression of the illegally procured evidence. *Weeks v. United States* (1914) 232 U. S. 383.

3. *Wilkes v. Wood* (K. B. 1763) 19 How. St. Tr. 1153, 98 Eng. Rep. 489; *Entick v. Carrington* (K. B. 1765) 19 How. St. Tr. 1030, 95 Eng. Rep. 807; *Commonwealth v. Dana* (Mass. 1841) 2 Metc. 329; and see *Rhodes v. Graham* (1931) 238 Ky. 225, 37 S. W. (2d) 46.

4. See *People v. Defore* (1926) 242 N. Y. 13, 150 N. E. 585; 4 *Wigmore, Evidence* (2d ed. 1923) 639, sec. 2184.

against governmental invasion is embodied in the unreasonable search and seizure clause of the Fourth Amendment of the Constitution;⁵ the immunity from testimonial compulsion finds expression in the self-incrimination clause of the Fifth.⁶ After almost a century of silence as to their proper construction⁷ the Supreme Court in *Boyd v. United States*⁸ declared that these Amendments throw light on each other and must be read together. The Court there held that a statute compelling production of a defendant's own papers for evidentiary purposes violated not only the Fifth Amendment, but also the Fourth.⁹ This fusion of the Amendments has been subjected to strong criticism,¹⁰ and indeed a unanimous opinion of the Court subsequently held that evidence obtained by unlawful search was not incompetent for that reason.¹¹ However in 1914 came the sweeping pronouncement of the *Weeks* case that evidence obtained in violation of the Fourth Amendment may not under the Fifth be received against the accused in a federal court, if he moves to suppress it before trial.¹² This privilege finds its justification in being the only practical sanction for the provisions of the former Amendment.¹³

5. It is generally stated that the Fourth Amendment was directed against the evils of the writs of assistance and general warrants, the use of which was overthrown in England by *Entick v. Carrington* (K. B. 1765) 19 How. St. Tr. 1030, 95 Eng. Rep. 807. See Howard, *Admissibility of Evidence Obtained by Wire Tapping* (1928) 40 U. of Mo. Bull. L. Ser. 13.

6. Professor Corwin points out that by the ordinary use of language the clause means no more than that nobody shall be compelled to give oral testimony against himself in a criminal proceeding in which he is defendant. This construction is corroborated by the use of the word "accused" in similar clauses in contemporaneous state constitutions. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 Mich. L. Rev. 1.

7. The self-incrimination clause was not used in this period because of the congressional imposition on the federal courts of the common-law practice which excluded the accused from the witness stand. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 Mich. L. Rev. 1.

8. (1886) 116 U. S. 616.

9. The entire Court agreed that the act in question was in contravention of the Fifth Amendment; but the majority of seven, in what has been called "obiter," also declared that seizure of documents of a defendant to be used in evidence against him is unreasonable under the Fourth Amendment and that such documents are protected by the privilege against self-incrimination.

10. Professor Wigmore successfully demonstrates that such a construction is logically unjustifiable and that the two amendments should be separately construed. 4 Wigmore, *Evidence* (2d ed. 1923) 867, sec. 2264. See also opinion of Cardozo, J., in *People v. Defore* (1926) 242 N. Y. 13, 150 N. E. 585; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 Mich. L. Rev. 191.

11. *Adams v. New York* (1904) 192 U. S. 585.

12. *Weeks v. United States* (1914) 232 U. S. 383.

13. 232 U. S. at 393. See also Atkinson, *Admissibility of Evidence Obtained through Unreasonable Search and Seizure* (1925) 25 Col. L. Rev.

Subsequent cases apply the Fifth Amendment to all cases where the Fourth is involved.¹⁴

Relying on this course of judicial legislation, the defendants in *Olmstead v. United States*,¹⁵ convicted of a conspiracy to violate the National Prohibition Act by evidence obtained by wire tapping, sought to have it excluded as violative of the Fourth and Fifth Amendments and of a state statute making wire tapping a crime. Although protection of the Fourth Amendment long ago had been extended to sealed matter in the mails,¹⁶ the court by a five to four decision held that the Amendment did not apply because it enjoins search of only material things. The Fifth Amendment was then held not to apply unless the Fourth was first violated. The state statute was declared to have no effect on the rules of evidence in federal courts.¹⁷ The majority held that the common-law doctrine required the admission of the evidence. While the grounds of the four dissents were various,¹⁸ a common divergence from the majority's view as to the public policy of admitting the evidence was manifest.

Although the exception to the common-law rule of admissibility, based on constitutional grounds, has been confirmed by many federal cases¹⁹ and has been adopted by many state courts,²⁰

11, 26-7; Ely, *Federal Constitutional Limitations on Searches by State Authority* (1927) 12 *ST. LOUIS LAW REVIEW* 159. On the other hand Fraenkel contends that the federal doctrine as stated in the Weeks case actually effects no restriction on unreasonable searches and seizures, but that it seems to have an opposite result if the number of cases arising under the federal rule be a measure. Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 *MINN. L. REV.* 1.

14. *Gouled v. United States* (1921) 255 U. S. 298; *Agnello v. United States* (1925) 269 U. S. 20; *Olmstead v. United States* (1928) 277 U. S. 438.

15. (1928) 277 U. S. 438.

16. *Ex parte Jackson* (1877) 96 U. S. 727. The Jackson case was distinguished by the majority on the grounds (1) that mailed matter is under the special monopolistic protection of the government; and (2) that such matter is a tangible paper or effect within the meaning of the Amendment. Mr. Justice Brandeis in his dissent discounted this distinction. 277 U. S. at 471. Rudkin, J., in his dissent below annihilated the distinction with forceful perspicuity. *Olmstead v. United States* (C. C. A. 9, 1927) 19 F. (2d) 843, 850.

17. Mr. Chief Justice Taft pointed out (1) that the statute was not a rule of evidence; (2) that state statutes pertaining to admissibility of evidence passed after 1789 or after the state's admission to the union are inapplicable in federal courts. *United States v. Reid* (1851) 53 U. S. 361.

18. Mr. Justice Brandeis dissented both as to the constitutional and the state statutory questions. Mr. Justice Holmes held the evidence inadmissible on the statutory ground. Mr. Justice Butler confined himself to the constitutional question. Mr. Justice Stone concurred in all dissents as to the merits of the question.

19. *Silverthorne Lbr. Co. v. United States* (1920) 251 U. S. 385; *Amos v. United States* (1921) 255 U. S. 313; *Agnello v. United States* (1925)

a trend toward confining the scope of the rule of exclusion has been detected by some authorities.²¹ Thus, evidence obtained on a warrantless search and seizure by a private person or by a state or local officer is admissible if there is no collusion with a federal officer.²² So also, evidence uncovered by a warrantless search and seizure on or after a lawful arrest²³ or with the accused's consent²⁴ is admissible in court. Upon showing of probable cause, search and seizure are not illegal, and the evidence uncovered is admissible.²⁵ Evidence obtained by a warrantless search and seizure of a third person's premises affords a defendant no ground for complaint.²⁶ Indeed where the warrantless search and seizure are conducted anywhere but in the defendant's home or office, he seems not to be protected against the use of such evidence.²⁷ Evidence obtained by a warrantless search and seizure of contraband goods is not within the federal exclusion rule.²⁸ Frequently the courts have found that the de-

269 U. S. 20; *Gambino v. United States* (1927) 275 U. S. 310; *United States v. Lefkowitz* (1931) 285 U. S. 452.

20. Cases have been fully collected in 4 Wigmore, *Evidence* (2d ed. 1923) 627-631, sec. 2183, and in Wigmore, *Evidence* (2d ed. Supp. 1934) 920-938, sec. 2183. Fraenkel points out that while only one state followed the federal rule in 1920, eighteen states, including Missouri, Illinois, and Oklahoma, had adopted it by 1928. Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 Minn. L. Rev. 1, citing *State v. Rebasti* (1924) 306 Mo. 336, 267 S. W. 858; *People v. Castree* (1924) 311 Ill. 392, 143 N. E. 112; *Hess v. State* (1921) 84 Okla. 73, 202 Pac. 310.

21. Wigmore, *Evidence* (2d ed. Supp. 1934) 940-1, sec. 2184 a; *Comment* (1936) 27 J. Crim. L. and Criminology 601; *Comment* (1937) 22 *Corn. L. Q.* 585.

22. *Burdeau v. McDowell* (1921) 256 U. S. 465; *Riggs v. United States* (C. C. A. 4, 1924) 299 Fed. 273; *Note* (1928) 14 *SAINT LOUIS LAW REVIEW* 49.

23. *Brady v. United States* (C. C. A. 6, 1924) 300 Fed. 540; *Gaines v. State* (1924) 28 Okla. Cr. 353, 230 Pac. 946.

24. *Mansolilli v. United States* (C. C. A. 1, 1924) 2 F. (2d) 42; *Coleman v. Commonwealth* (1927) 218 Ky. 841, 292 S. W. 771.

25. *Siden v. United States* (C. C. A. 8, 1925) 9 F. (2d) 746; *State v. Rhodes* (1927) 316 Mo. 571, 292 S. W. 78.

26. *Cravens v. United States* (C. C. A. 8, 1933) 62 F. (2d) 261; *Holmes v. State* (Tex. Cr. App. 1938) 120 S. W. (2d) 595.

27. *Hester v. United States* (1924) 265 U. S. 57 (evidence seized in open field owned by defendant); *Carroll v. United States* (1925) 267 U. S. 182 (automobile on highway); *Scher v. United States* (1938) 6 U. S. L. Week 420 (automobile in open garage); *State v. Padgett* (1926) 316 Mo. 179, 289 S. W. 954 (automobile); *Ratzell v. State* (1924) 27 Okla. Cr. 340, 228 Pac. 166 (wild ravine); but see *Washington v. State* (Okla. 1937) 64 P. (2d) 926, (1937) 22 *Corn. L. Q.* 585.

28. See authorities cited supra, note 21; and see *Fenton v. United States* (D. C. Mont. 1920) 268 Fed. 221; *Carroll v. United States* (1925) 267 U. S. 132; *Carvalho v. United States* (C. C. A. 1, 1931) 54 F. (2d) 232. There were present in the latter two of these cases other facts to take the cases out of the federal rule. Cf. *State v. Owens* (1924) 302 Mo. 348, 259

defendant had waived the right to object to the use of evidence obtained in violation of his constitutional guaranties.²⁹ *Olmstead v. United States*³⁰ has thus been explained as engraving another exception on the Supreme Court's rule of inadmissibility.³¹

The *Olmstead* decision evoked wide criticism.³² However, the Court suggested that Congress might by direct legislation make such evidence inadmissible.³³ Whether Congress had intended such a departure from the common law of evidence in enacting the Communications Act of 1934³⁴ was answered in the affirma-

S. W. 100, holding that contraband property unlawfully seized is prohibited from use as evidence; *Agnello v. United States* (1925) 269 U. S. 20, excluding evidence of contraband narcotics illegally seized.

29. *Winkle v. United States* (C. C. A. 8, 1923) 291 Fed. 493 (motion for return of evidence on its proffer in court held too late); *United States v. Shules* (C. C. A. 2, 1933) 65 F. (2d) 780 (waiver by giving bond); *People v. Kramer* (1932) 260 Mich. 94, 244 N. W. 243 (the issue not triable at trial if pre-trial motion denied); *State v. King* (Mo. 1932) 53 S. W. (2d) 252 (pre-trial motion for suppression omitted); *Walker v. State* (1925) 31 Okla. 326, 239 Pac. 191 (untimely objection). However, it has been held that no pre-trial motion for return of the illegally obtained evidence is necessary when the facts are undisputed, are brought out by the prosecution's evidence, or are unknown to defendant before trial. *Amos v. United States* (1921) 255 U. S. 313; *Poulos v. United States* (C. C. A. 6, 1925) 8 F. (2d) 119; *Agnello v. United States* (1925) 269 U. S. 20.

30. (1928) 277 U. S. 438.

31. *Fraenkel, Recent Developments in the Law of Search and Seizure* (1928) 13 Minn. L. Rev. 1; *Black, Ill Starred Prohibition Cases* (1931) 82, c. 3; *Comment* (1936) 27 J. Crim. L. and Criminology 601. Federal cases following the *Olmstead* case are: *Kerns v. United States* (C. C. A. 6, 1931) 50 F. (2d) 602; *Morton v. United States* (C. C. A. 7, 1932) 60 F. (2d) 697; *Foley v. United States* (C. C. A. 5, 1933) 64 F. (2d) 1; *Bushouse v. United States* (C. C. A. 6, 1933) 67 F. (2d) 843; *Beard v. United States* (App. D. C. 1936) 82 F. (2d) 837; *Smith v. United States* (App. D. C. 1937) 91 F. (2d) 556.

32. *Black, Ill Starred Prohibition Cases* (1931) 79-90, c. 3; *Comment* (1938) 15 N. Y. U. L. Q. Rev. 279; *Editorial, St. Louis Post Dispatch*, Nov. 21, 1937, p. 2-I: 2; *Fraenkel, Recent Developments in the Law of Search and Seizure* (1928) 13 Minn. L. Rev. 1; *Howard, Admissibility of Evidence Obtained by Wire Tapping* (1928) 40 U. of Mo. Bull. L. Ser. 13.

33. *Olmstead v. United States* (1928) 277 U. S. 438, 465. Two federal statutes of very limited application had dealt with the subject before the passage of the Communications Act of 1934 (*infra*, note 34): (1918) 40 Stat. 1017; (1933) 48 Stat. 1064, 1100, (1928) 47 U. S. C. A. sec. 501. See *Comment* (1938) 4 Ohio St. U. L. J. 242. Many states have also passed statutes making interception of telephone or telegraph messages a crime. See, e. g., *Ark. Pope's Dig. Stats.* (1937) sec. 14255; *Ill. Smith-Hurd's Ann. Stats.* (1931) c. 134, secs. 15a, 16; *Kan. Gen. Stats. Anno.* (1935) c. 17, sec. 1908; *Okla. Harlow's Stats.* (1931) sec. 2356. Statutes of twenty-six states are cited in Mr. Justice Brandeis' dissent in *Olmstead v. United States* (1928) 277 U. S. 438, 466. Statutes of thirty-five states are also there cited, which make it a criminal offense for a company engaged in transmission of messages or for any of its agents to disclose their contents.

34. (1934) 48 Stat. 1103, (1938 Supp.) 47 U. S. C. A. sec. 605.

tive by the Court in the recent seven to two decision in *Nardone v. United States*.³⁵ The Act, the purpose of which was to regulate interstate and foreign communications,³⁶ forbade the interception of any communication and the disclosure of its contents or meaning.³⁷ The Act was construed to embrace federal agents in its prohibition and to alter the common law of evidence by precluding disclosure by testimony in court of intercepted interstate communications.³⁸

The question yet unanswered by the Supreme Court is the admissibility in federal courts of intrastate messages³⁹ intercepted by federal agents. That question was represented first in *Valli v. United States*.⁴⁰ Not only was the applicability of the Federal Communications Act⁴¹ involved, but the effect of a state statute making wire tapping a crime⁴² again had to be con-

35. (1937) 302 U. S. 379, rev'g *United States v. Nardone* (C. C. A. 2, 1937) 90 F. (2d) 630, which held the *Olmstead* decision binding.

36. (1934) 48 Stat. 1064, (1938 Supp.) 47 U. S. C. A. sec. 151. Committee reports emphasized the major purpose as the transfer of jurisdiction over wire and radio communication to the new Federal Communications Commission. *Nardone v. United States* (1937) 302 U. S. 382.

37. " * * * and 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." (1934) 48 Stat. 1103, (1938 Supp.) 47 U. S. C. A. sec. 605.

38. The dissent of Mr. Justice Sutherland demonstrates that such a construction was not necessary. Section 605 of the Act also prohibits the disclosure of any interstate or foreign communication by the person transmitting or receiving it except *inter alia* "on demand of other lawful authority." *Newfield v. Ryan* (C. C. A. 5, 1937) 91 F. (2d) 700, in construing this exception to the prohibition, held that a federal agency, here the Securities and Exchange Commission, could require by subpoena both interstate and intrastate telegrams to be delivered by the telegraph company.

39. The nature of the communication intercepted is not likely to give rise to any particular problem in state courts. Possessing plenary power over its own court procedure, a state may in its discretion permit or prevent the introduction in evidence of intercepted communications of any kind—foreign, interstate, or intrastate. Presumably a state can make the act of tapping any wire within its borders a crime, whether the wire be used to convey foreign, interstate, or intrastate messages. See *Olmstead v. United States* (1928) 277 U. S. 438, 470. In the only state case found presenting the issue of the admissibility of evidence obtained by wire tapping, the interception was held not to be an illegal search and seizure within the meaning of a state statute prohibiting the admission of evidence procured by illegal search and seizure. *Hitzelberger v. State* (Md. 1938) 197 Atl. 604, citing with approval, *Olmstead v. United States*, supra, and distinguishing *Nardone v. United States* (1937) 302 U. S. 379. See also *Goode v. State* (1930) 158 Miss. 616, 131 So. 106 (eavesdropping).

40. (C. C. A. 1, 1938) 94 F. (2d) 687. The Supreme Court granted certiorari, (1938) 303 U. S. 682, but the case was subsequently dismissed on motion of counsel for petitioners. (1938) 304 U. S. 586.

41. (1934) 48 Stat. 1103 (1938 Supp.) 47 U. S. C. A. sec. 605.

42. Eavesdropping Act, Mass. Gen. Laws (1932) c. 272, sec. 99.

sidered. The Court of Appeals for the First Circuit held itself bound by the *Olmstead* case as to the constitutionality of the admission of the evidence, "until the Supreme Court shall reverse its decision on this point." The state statute was ruled inapplicable on the grounds stated in the *Olmstead* case.⁴³ The dissenting judge differed on ethical considerations, holding that the *Nardone* decision is broad enough on that basis to exclude the evidence in the instant case.⁴⁴

A contrary result has been reached by the Circuit Court of Appeals for the Third Circuit. The *Nardone* case having held the second clause of Section 605 of the Federal Communications Act to be a rule of evidence in federal courts, the Act was found in *Sablowsky v. United States*⁴⁵ to embrace intrastate communications in its prohibitions against disclosure of intercepted communications. The conclusion was based on the omission of any qualifying phrase before "communications" in the pertinent clause of Section 605 and justified by the rule of liberal construction of remedial statutes.⁴⁶

A result similar to that in the *Valli* case has been reached in three recent federal court rulings where no state statute was involved.⁴⁷ Another recent decision from the Second Circuit Court of Appeals⁴⁸ assumes that evidence of intrastate telephone communications obtained by wire tapping are admissible, but

43. *Supra*, note 17.

44. 94 F. (2d) at 694. The judge opines that the dissents in the *Olmstead* case are now the view of the Supreme Court.

45. (C. C. A. 3, 1938) 6 U. S. L. Week 488.

46. The first and third clauses of sec. 605 of the Act, which specifically use the phrase "interstate or foreign communication," were distinguished from the second clause. The former clauses involve regulation of the employees of the carrier in the lawful receipt of messages; the latter clause is said to be a pure rule of evidence binding on federal courts. The former clauses were thus enacted under the power of Congress over foreign and interstate commerce; the latter clause was passed under constitutional provisions endowing Congress with powers in respect to federal courts.

47. *United States v. Reed* (C. C. A. 2, 1938) 96 F. (2d) 785; *United States v. Bianco* (D. C. E. D. Mo. 1938) Bull. of Current Decisions issued by Amer. T. & T. Co., No. 3883, holding that had Congress attempted to make sec. 605 of the Communications Act apply to intrastate communications, the section would be invalid; *United States v. Weiss* (D. C. E. D. N. Y. 1938) N. Y. Times, Jan. 14, 1938, p. 8:5, where the telephone conversations were presented by means of phonograph records. In *United States v. Reed*, *supra*, the court held, however, that the admission of intercepted interstate and intrastate messages was not shown to be reversible error where other competent testimony was given to the same effect. Counsel for the defendant petitioned the Supreme Court for certiorari, which was denied. (1938) 5 U. S. L. Week 126.

48. *United States v. Bonanzi* (C. C. A. 2, 1938) 94 F. (2d) 570. The *Nardone* Case came up from the Second Circuit.

reverses the district court's conviction thereon on the ground *inter alia* that the party offering the evidence failed to sustain his burden of showing that the communication intercepted was intrastate. However, evidence of local messages within the District of Columbia was held inadmissible,⁴⁹ the opinion relying on the Congressional policy as found in the *Nardone* case, the plenary power of Congress over the District of Columbia, and the desirability of a uniform rule of procedure.

Several grounds might be advanced for the position that evidence of intercepted intrastate communications should not be admitted in federal courts. First, wire tapping might well be held to be within the constitutional prohibitions of the Fourth and Fifth Amendments.⁵⁰ While such a holding would involve a direct overruling of the *Olmstead* decision,⁵¹ it would be in entire consonance with judicial construction of the Amendments for

49. *United States v. Plisco* (D. C. D. C. 1938) 22 F. Supp. 242; see Comment (1938) 51 Harv. L. Rev. 1109.

50. See the dissents by Mr. Justice Brandeis and Mr. Justice Butler in *Olmstead v. United States* (1928) 277 U. S. 438, 471-485, 485-6; Mr. Justice Roberts' opinion in *Nardone v. United States* (1937) 302 U. S. 379; Howard, Admissibility of Evidence Obtained by Wire Tapping (1928) 40 U. of Mo. Bull. L. Ser. 13; Fraenkel, Recent Developments in the Law of Search and Seizure (1928) 13 Minn. L. Rev. 1.

51. (1928) 277 U. S. 438. Professor Wigmore laments that all of the opinions in the *Olmstead* case ignored the fundamental practical question. He suggests that wire tapping need be neither constitutional nor unconstitutional *per se*, and proposes a middle ground. Since only unreasonable searches and seizures are prohibited by the Constitution, he suggests a species of administrative restraint be imposed on wire-tapping and interception of the mails, corresponding to warrants in other cases of search and seizure. Wigmore, Telephone Wire-Tapping as a Violation of the Fourth Amendment (1928) 23 Ill. L. Rev. 377. Black concurs in the suggestion in his *Ill Starred Prohibition Cases* (1931) 80-1. As a matter of fact it appears that such administrative regulations have been adopted and followed by the Department of Justice. *New York Times*, Dec. 23, 1937, p. 16: 6. Professor Wigmore is thus consistent in ignoring the interdependence of the Fourth and Fifth Amendments in their construction by the Supreme Court. However Mr. Justice Brandeis clearly states that the use as evidence in a criminal proceeding of facts ascertained by wire tapping must be deemed a violation of the Fifth Amendment. Moreover although Professor Wigmore has refused to recognize the rule, it is apparently settled by decisions of the Supreme Court that a search with or without a warrant solely for the purpose of procuring evidence and not to seize property which the government has a right to take or which is unlawfully or wrongfully possessed by the individual is unreasonable. *Gouled v. United States* (1921) 255 U. S. 298; *United States v. Lefkowitz* (1932) 285 U. S. 452. Since wire-tapping, whether supervised or not, could have no other purpose than the procurement of evidence, it is submitted that if a search and seizure at all, wire-tapping must be unreasonable and therefore violative of the Fourth Amendment. Such an illegal interference with the individual's privacy is within the purpose and intent of the prohibitory clauses of the Amendment, if not within its literal purview.

over half a century.⁵² Further, the reason for excluding evidence obtained in violation of the Constitution might be extended to require exclusion of evidence obtained in violation of a statute, whether state or federal.⁵³

Another basis for the imposition of the judicial bar may be discovered in the Federal Communications Act of 1934.⁵⁴ Whereas Section 605 provides that interstate and foreign messages lawfully known to employees of the communication agency may be disclosed "on demand of lawful authority,"⁵⁵ it forbids divulgence of "any" intercepted communications.⁵⁶ Inasmuch as wires of communication and air waves are instrumentalities used in interstate commerce, it may be believed that all messages, whether interstate, intrastate, or foreign, are under the jurisdiction of the Federal Communications Commission while being transmitted over the wires or waves.⁵⁷ Whether or not that is so, the reasoning of the *Nardone* decision,⁵⁸ which construes the pertinent clause of Section 605 to be a pure rule of evidence, applies with equal strength to intercepted intrastate and interstate messages.⁵⁹

52. *Ex parte Jackson* (1877) 96 U. S. 727; *Boyd v. United States* (1886) 116 U. S. 616; *Counselman v. Hitchcock* (1892) 142 U. S. 547; *Gouled v. United States* (1921) 25 U. S. 298; *Gambino v. United States* (1927) 275 U. S. 310.

53. Expressions of this view may be found in Mr. Justice Brandeis' and Mr. Justice Holmes' dissents in *Olmstead v. United States* (1928) 277 U. S. 438, 471, 469; J. Morton's dissent in *Valli v. United States* (C. C. A. 1, 1938) 94 F. (2d) 694; J. Cox's opinion in *United States v. Plisco* (D. C. D. C. 1938) 22 F. Supp. 242; Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 Minn. L. Rev. 1.

54. (1934) 48 Stat. 1103, (1938 Supp.) 47 U. S. C. A. sec. 605. See *Sablowsky v. United States* (U. S. 1938) 6 U. S. L. Week 488.

55. First and third clauses.

56. Second and fourth clauses. Would not "any" include intrastate as well as interstate and foreign messages? Plausible reasons can be thought of for this difference in the provisions touching intercepted communications and those affecting messages in the lawful possession of employees.

57. See persuasive language in *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 544; *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937) 301 U. S. 1, 36. Otherwise telephone and telegraph lines and air waves would at one instant be under the supervision of the federal agency and at the next instant under the control of the state.

58. (1937) 302 U. S. 379. There is nothing said in the opinion in this case in favor of a different definition of the scope of the provisions relating to intercepted communications. The suggested view is more in accord with the declared purpose and intent of the framers of the act than is a narrower construction. (1934) 48 Stat. 1064, (1938 Supp.) 47 U. S. C. A. sec. 151.

59. Congress possesses power to provide that federal officers may not divulge intercepted intrastate communications in the federal courts. U. S. Const. Art. III, Sec. 1; *Sablowsky v. United States* (C. C. A. 3, 1938) 6 U. S. L. Week 488.

Finally, the evidence might be excluded on considerations of ethics and social policy.⁶⁰ Indeed the authorities seem agreed that the question must be ultimately settled on grounds of policy.⁶¹ Proponents of admissibility of the evidence point to the public interest in the detection and conviction of criminals.⁶² Opponents assert that a paramount public interest arises from a knowledge that law enforcement is effected through agencies which must and do respect the law and the privacy and personal security of the individual citizen.⁶³ It is well known that public sentiment was hostile to many methods adopted by such agencies during the era of national prohibition.⁶⁴ In view of the previous judicial

60. See the dissenting opinions of Mr. Justice Brandeis and Mr. Justice Holmes in *Burdeau v. McDowell* (1921) 256 U. S. 465, 477; the dissents of the same justices in *Olmstead v. United States* (1928) 277 U. S. 438, 471, 469; Mr. Justice Roberts' opinion in *Nardone v. United States* (1937) 302 U. S. 379; Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 Minn. L. Rev. 1. Judicial expressions may be found designating the practice of using wire-tapping evidence as "dirty business," as "means which shock the common man's sense of decency and fair play," and as "coming into court with unclean hands." A suggested analogy is the doctrine of entrapment, the bases for which are reconsidered and discussed in the opinions of Mr. Chief Justice Hughes and Mr. Justice Roberts in *Sorrells v. State* (1932) 287 U. S. 435, 453. Howard, *Admissibility of Evidence Obtained by Wire Tapping* (1928) 40 U. of Mo. Bull. L. Ser. 13.

61. Mr. Justice Roberts in *Nardone v. United States* (1937) 302 U. S. 379; Ely, *Federal Limitations on Searches by State Authority* (1927) 12 *ST. LOUIS LAW REVIEW* 159; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 *Mich. L. Rev.* 1.

62. See, for instance, Mr. Chief Justice Taft's opinion in *Olmstead v. United States* (1928) 277 U. S. 438; Mr. Justice Sutherland's dissent in *Nardone v. United States* (1937) 302 U. S. 379; *United States v. One Ford V-8 Sedan* (W. D. Mich. 1934) 7 *F. Supp.* 705; Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (1930) 29 *Mich. L. Rev.* 1; Broadhurst, *Use of Evidence Obtained by Illegal Search and Seizure* (1936) 24 *Ky. L. J.* 191; Wigmore, *Evidence* (2d ed. Supp. 1934) 950, sec. 2184b. It has been suggested that "listening in" on telephone conversations may still be permissible under the *Nardone* Case. *New York Times*, Dec. 21, 1937, p. 1: 1. The *Nardone* decision would not then greatly hinder agencies of law enforcement if evidence uncovered by means of and through the use of inadmissible intercepted information is admitted. A suggested analogy is the admission of facts discovered on the basis of an inadmissible confession. 2 Wigmore, *Evidence* (2d ed. 1923) sec. 859; Comment (1938) 86 *U. of Pa. L. Rev.* 436. It is submitted that such a practice is not less a violation of the Fourth Amendment and is not less unethical than the use of wire-tapping evidence itself.

63. *Supra*, note 60.

64. Black, *Ill Starred Prohibition Cases* (1931) 9, 15, 79; Editorial, *St. Louis Post-Dispatch*, Dec. 21, 1937, p. 2-C: 2. Professor Wigmore points out that the federal doctrine of exclusion of illegally obtained evidence was largely based on cases involving violation of the Eighteenth Amendment. By way of wishful thinking, he adds that since the repeal of that amendment the orthodox rule of absolute admissibility will probably once more make its appearance. Wigmore, *Evidence* (2d ed. Supp. 1934) 941, sec. 2184a.

declarations and alignments of the present personnel of the Court,⁶⁵ it may well be that ethical considerations and the policy against allowing contamination of the judicial process will weigh heavily with the Court should the question of the admissibility of intercepted intrastate messages be presented for its decision.

FRANK R. KENNEDY.

65. It is significant that the five justices who participated in both the *Olmstead* and *Nardone* cases maintained the same attitude toward the admission of the evidence obtained from the tapped wires. It is therefore more than likely that the *Nardone* case was a decision, at least as to those justices, on the merits of the controversy rather than merely a construction of the federal statute involved. See Comment (1938) 86 U. of Pa. L. Rev. 436. It is possible that Mr. Justice Reed might disqualify himself for consideration of this subject, having been of counsel as Solicitor General in the *Nardone* case. (1938) 5 U. S. Law Week 404. There was some comment that Mr. Justice Black, who as head of the Senate Lobby Committee insisted that private telegraph messages should be copied, voted in the *Nardone* Case that the statutory provision against revelation of telephone messages extends even to federal agents. N. Y. Times, Dec. 21, 1937, p. 1: 1.