University of Miami Law Review

Volume 3 | Number 4 Article 7

6-1-1949

Wire Tapping

Irving Pescoe

Robert H. Slatko

COMMENTS

WIRE TAPPING

I

Development of the Law of Wire Tapping in Federal Courts

The Fourth Amendment to the Constitution, prohibiting unreasonable searches and seizures of one's person, house, papers and effects,[1] has not, in itself, been construed to render evidence obtained in violation of its provisions inadmissible in criminal prosecutions against the person from whom such evidence was seized.[2] But, by reading the Fourth Amendment in conjunction with that clause of the Fifth Amendment which privileges one against being "compelled in any criminal case to be a witness against himself," [3] evidence obtained in a search or seizure "unreasonable" in the sense of the Fourth Amendment is rendered inadmissible in federal criminal prosecutions.[4] Engaging in such judicial legislation, the Court created the "federal rule" which permits admission of evidence despite its illegal obtention, in conformity with common law principles,[5] except where such admission violates rights guaranteed to the defendant by the Fourth and Fifth Amendments of the Constitution.[6]

---

1. U. S. Const. Amend. IV provides, "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 person or things to be seized."

2. Rippey v. State, Tex. Crim. Rep. 539, 219 S. W. 463 (1920); State v. Wallace, 162 N. C. 622, 78 S. E. 1 (1913); Hardesty v. United States, 168 Fed. 25 (C. C. A. 6th 1909); Bacon v. United States, 97 Fed. 35 (C. C. A. 8th 1899), *cert. denied*, 175 U. S. 726 (1899); Gindrat v. People, 138 Ill. 103, 27 N. E. 1085 (1891); Commonwealth v. Dana, 2 Mete. 329 (Mass. 1841). *But cf.* Adams v. New York, 192 U. S. 585 (1904).

3. U. S. Const. Amend. V provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." (Italics ours)

4. Boyd v. United States, 116 U. S. 616 (1886).

5. Jordan v. Lewis, 14 East 306, 104 Eng. Rep. 618 (1740); Legett v. Tollervey, 14 East 302, 104 Eng. Rep. 617 (1811); Commonwealth v. Dana, 2 Mete. 329 (Mass. 1841); State v. Flynn, 36 N. H. 64 (1858); Imboden v. People, 40 Colo. 142, 90 Pac. 608 (1907). *Contra*: State v. Sheridan, 121 Iowa 164, 96 N. W. 730 (1903); State v. Slamon, 73 Vt. 212, 50 Atl. 1097 (1901). *Cf.* Underwood v. State, 13 Ga. App. 206, 78 S. E. 1103 (1913). See Note, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 Yale L. J. 536 (1927).

6. Byars v. **United States, 273** U. S. 28 (1926); Henderson v. United States, 12 F.2d 528 (C. C. A. **4th 1926**); **Murphy** v. United States, 285 Fed. 801 (C. C. A. 7th 1923); United States v. Talloco, 277 Fed. 75 (W. D. Mo. 1922); Dukes v. United

These constitutional amendments have been invoked to exclude not only evidence seized without warrant,[7] but also to invalidate a statute authorizing the issuance of warrants for the sole purpose of acquiring evidence to be used against the person to whom the warrant was directed.[8]

In *Olmstead v. United States*,[9] a much criticized decision,[10] the Court ruled on the admissibility of evidence obtained by wire tapping for the first time. Wire tapping was held not to be a search or seizure within the meaning of the Fourth Amendment as ". . . the search is to be of material things—the person, the house, his papers or his effects. . . . The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only." [11] The federal rule, then, does not operate to exclude evidence so obtained.

As an immediate reaction to the *Olmstead* decision, several bills aimed at prohibiting the use of evidence obtained by wire tapping from admission in federal courts were considered in Congress but were never passed.[12] In 1934 Congress, with the purpose of transferring jurisdiction over radio and wire communications to the recently created Federal Communications Commission,[13] reenacted provisions of the Radio Act of 1927.[14] Section 605 [15] provides,

States, 275 Fed. 142 (C. C. A. 4th 1921); United States v. Rykowski, 267 Fed. 866 (S. D. Ohio 1920); see Note, 150 A. L. R. 566 (1944).

7. Weeks v. United States, 232 U. S. 383 (1914). *Accord*, United States v. Lefkowitz, 285 U. S. 452 (1931); Agnello v. United States, 269 U. S. 20 (1925); Amos v. United States, 255 U. S. 313 (1921); Gouled v. United States, 255 U. S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920). *But cf.* Adams v. New York, 192 U. S. 585 (1904).

8. See note 4 *supra*.

9. 277 U. S. 438 (1928). *Accord*, Bushouse v. United States, 67 F.2d 843 (C. C. A. 6th 1933); Foley v. United States, 64 F.2d 1 (C. C. A. 5th 1933), *cert. denied*, 285 U. S. 762 (1933); Morton v. United States, 60 F.2d 696 (C. C. A. 7th 1932), *cert. denied*, 288 U. S. 607 (1933).

10. Notes, 27 MICH. L. REV. 78 (1928), 38 YALE L. J. 77 (1928), 77 U. OF PA. L. REV. 139 (1928).

11. Olmstead v. United States, 277 U. S. 438, 464 (1928).

12. H. R. No. 5416, 71st Cong., 1st Sess. (1929) (No information or evidence obtained by or resulting from the tapping of telephone or telegraph wires . . . shall be admitted as evidence in the courts of the United States in civil suits and criminal prosecutions). See also H. R. No. 4139, SEN. 6061, 71st Cong., 1st Sess. (1929).

13. SEN. REP. No. 781, 73d Cong. 2d Sess. (1934).

14. 44 STAT. 1172 (1927).

15. 48 STAT. 1103 (1934) provides that, "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; 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; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become ac-

". . . 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." [16]

Following the passage of this provision, arose the first *Nardone* case.[17] The issue presented was whether, in view of Section 605, direct evidence procured by a federal officer's interception of defendant's interstate telephone communication was admissible in a federal criminal trial. Although recognizing that certain factors indicated Congress had not intended Section 605 to have evidentiary effect,[18] the Court in a widely discussed opinion,[19] held that such evidence was inadmissible as ". . . the plain words of Section 605, . . . direct . . . 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 testimony." [20] In the second *Nardone* case,[21] the Court clarified and extended this rule by construing Section 605 to proscribe the use of evidence acquired in an indirect manner from illegally intercepted messages as well as original messages themselves, and that the accused must be given an opportunity "to prove that a substantial portion of the case against him was the fruit of the poisonous tree." [22]

An allied problem was ruled on in the same term. In *Weiss v. United States*,[23] wires had been tapped and the intercepted messages recorded on discs. The Government urged that the messages, being intrastate in character, were beyond the purview of Section 605, but to no avail. Intrastate communications were not to be excluded from protection against interception and divulgence where the same lines might be used for interstate communications. Subsequently, in *Goldstein v. United States*,[24] it became evident that the Court would not further enlarge the scope of Section 605. The defendants were not parties to the intercepted conversations. Their objection to the introduction of the messages was overruled, it being concluded that the introduction of evidence

---

quainted with the contents, substance, purport, effect, or meaning of the same, or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *provided*, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

16. 48 STAT. 1100 (1934), 47 U. S. C. A. § 501 (Supp. 1946) punishes the willful and knowing violation of § 605 by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

17. Nardone v. United States, 302 U. S. 379 (1937).

18. *Id.* at 382.

19. See 20 B. U. L. REV. 362 (1940); 11 So. CALIF. L. REV. 369 (1938); 26 ILL. BAR J. 376 (1938); 86 U. OF PA. L. REV. 436 (1938).

20. See note 17 *supra*, at 382.

21. Nardone v. United States, 308 U. S. 338 (1939).

22. *Id.* at 341.

23. 308 U. S. 321 (1939).

24. 316 U. S. 114 (1942).

obtained in violation of Section 605 could be objected to only by the parties to the intercepted communication. It was reasoned that since the right to object to the introduction of illegally obtained evidence is available only to that person from whom it was so obtained, *a fortiori,* one not a party to the illegally intercepted message may not object to its use in evidence.[25] Section 605 was further restricted when, shortly thereafter, use of a detectaphone was not considered as coming within the purview of the statute.[26]

Summarized briefly, the Federal Communications Act has been construed to render inadmissible, upon proper objection by either of the parties to the conversation,[27] all evidence obtained directly [28] or indirectly [29] by means of a wire tap. This result follows even where the messages are intrastate in character, provided that they were transmitted through facilities forming a possible part of an interstate network.[30] The protection thus afforded by Section 605 in the field of wire communications is somewhat analogous to protection afforded one's person and property by the Fourth Amendment [31] but is more extensive. The former affords greater security against the invasion of one's right to privacy, for the Fourth Amendment protects one only against *unreasonable* searches and seizures;[32] whereas Section 605 forbids *all* unauthorized interceptions, and makes no provision for the issuance of a warrant authorizing wire tapping.[33] Furthermore, the Fourth Amendment protects only against the search and seizure of federal agents [34] while under Section 605, protection is afforded against the use of wire tapped evidence in federal courts secured by any person.[35]

---

25. *Id.* at 121.
26. Goldman v. United States, 316 U. S. 129 (1942).
27. United States v. Polakoff, 112 F.2d 888 (C. C. A. 2d 1940) (both parties to conversations are "senders" within the meaning of Sec. 605, and the authorization of both is necessary to render the evidence admissible); United States v. Fallon, 112 F.2d 894 (C. C. A. 2d 1940); *contra,* United States v. Yee Ping Jong, 26 F. Supp. 69 (W. D. Pa. 1939).
28. United States v. Nardone, 302 U. S. 379 (1937); United States v. Bernava, 95 F.2d 310 (C. C. A. 2d 1938); Diamond v. United States, 94 F.2d 1012 (C. C. A. 6th 1938).
29. Nardone v. United States, 308 U. S. 338 (1939); *see* United States v. Goldstein, 120 F.2d 485, 488 (C. C. A. 2d 1941), *aff'd* 316 U. S. 114 (1942).
30. United States v. Weiss, *supra;* Sablonsky v. United States, 101 F.2d 183 (C. C. A. 3d 1938); United States v. Klee, 101 F.2d 191 (C. C. A. 3d 1938); Diamond v. United States, 108 F.2d 859 (C. C. A. 6th 1938); *but see* United States v. Bonanzi, 94 F.2d 570, 572 (C. C. A. 2d 1938). *Contra:* Valli v. United States, 94 F.2d 687 (C. C. A. 1st 1938).
31. *See* Nardone v. United States, 302 U. S. 379, 383 (1937).
32. See note 1 *supra.*
33. See note 15 *supra.*
34. Burdeau v. McDowell, 256 U. S. 465 (1921); Weeks v. United States, 232 U. S. 333 (1914) (Fourth Amendment was inapplicable to individual misconduct of state officers).
35. See notes 15 and 20 *supra.*

II

Development of the Law of Wire Tapping in State Courts

The general problem of the admissibility in state courts of evidence obtained in an illegal manner is essentially different from that in the federal courts. The federal rule admits evidence despite its illegal source except where such admission would violate rights guaranteed to the defendant by the Fourth and Fifth Amendments;[36] but such amendments are not applicable to the states,[37] nor are they made so by operation of the Fourteenth Amendment.[38] Even so, a large number of states have voluntarily adopted the federal rule.[39] Such adoption does not affect the admissibility of evidence obtained by wire tapping for, as in the federal courts, wire tapping is not considered an unreasonable search or seizure.[40] Objections to the admission of wire tapped evidence in the state courts have been posed primarily on statutory prohibitions.

State statutes which might bear on the admissibility of evidence obtained by wire tapping are of several different types. The acts longest in existence do not deal with wire tapping but are concerned with acts of trespass and malicious mischief upon the facilities of telegraph and telephone companies.[41] A more comprehensive type of statute forbids any form of unlawful interference with communications or distortion of the message even though such interference does not constitute a trespass or malicious mischief.[42] Most of the statutes attempt to ban unequivocally all wire tapping and, to this end, make any violation of their provisions misdemeanors.[43] No cases have been found

36. See notes 5 and 6 *supra*. For treatment of the law on illegal search and seizure, see Notes, 58 Yale L. J. 144 (1948), 36 Yale L. J. 536 (1927).

37. Twining v. New Jersey, 211 U. S. 78 (1908); *accord*, Spies v. Illinois, 123 U. S. 131 (1887); *cf.* Palko v. Connecticut, 302 U. S. 319 (1937).

38. Twining v. New Jersey, *supra;* Palko v. Connecticut, *supra;* People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926), *cert. denied*, 270 U. S. 657 (1926).

39. Rosenzweig, *The Law of Wire Tapping*, 32 Corn. L. Q. 514, 525 (1947); Note, 58 Yale L. J. 144, 150 (1948).

40. Leon v. State, 180 Md. 279, 27 A.2d 706 (1941), *cert. denied sub. nom* Neal v. State, 316 U. S. 680 (1942); Hitzelberger v. State, 174 Md. 152, 197 Atl. 605 (1938); Young v. Young, 56 R. I. 401, 285 Atl. 901 (1936).

41. Georgia's statute, for example, provides that, "Any person who shall wilfully destroy or in any way injure the posts, wires, or fixtures of a magnetic telegraph company, shall be guilty of a misdemeanor." Ga. Code Ann. § 26-8114 (1936).

42. "Every person who unlawfully or maliciously takes down, removes, injures, interferes with, or obstructs any wire or poles erected by any telegraph or telephone company, or maintained by proper authority for the purpose of transmitting intelligence, or any part thereof, or any insulator or cross arms, appurtenance or apparatus connected therewith, or unlawfully severs or in any way unlawfully interferes with any wire, cable, or current thereof, upon conviction shall be deemed guilty of a misdemeanor and punishable by imprisonment not exceeding thirty days, or by fine not exceeding one hundred dollars." S. C. Code Ann. § 1201 (1942).

43. "Every person who shall make a connection, by wire or otherwise, with any telegraph or telephone wires, not owned or leased by him, for the purpose of obtaining information or listening to the transmission of telegraphic dispatches or telephone messages to which he is not entitled; and any person who wrongfully obtains or attempts to obtain any knowledge of a telegraphic or telephone message by connivance with a clerk, operator, messenger or other employe of a telegraph or telephone company, or who being such clerk, operator, messenger, or other employe, wilfully divulges to anyone

wherein state courts have construed such laws so as to render inadmissible evidence obtained by wire tapping.[44] The Florida statute prohibits not only the interception of the communication, but also divulgence of its contents,[45] but has not as yet been interpreted by the courts.

> Whoever, without the consent of the owner thereof, destroys, damages, or in any way injures any telegraph or telephone poles, cables, wires, fixtures, or other apparatus, equipment, or appliances; or obstructs, impedes, or impairs the service of any telegraph or telephone line or lines, or the transmission of messages thereover; or attaches any unauthorized device or equipment to any telegraph or telephone line or instrument; or taps or connects, directly or indirectly, by wire or any other means whatsoever, to or with any telegraph or telephone line so as to hear, or be in position to hear, or to enable any other person to hear or be in position to hear, for any use or purpose whatsoever, any message going over said line, or for the purpose of receiving, or enabling any other person to receive any unauthorized service over said line, or uses, or attempts to use, in any manner or for any purpose, or communicates in any way, any information so obtained; or aids, agrees with, employs, or conspires with, any person to do or cause to be done any of the acts hereinbefore mentioned; shall be punished by fine not exceeding five hundred dollars or by imprisonment not exceeding six months.

A recent New York statute, providing a procedure for supervised wire tapping, may presage a new trend in wire tapping statutes.[46] The statute authorizes the issuance of orders permitting wire tapping upon oath of specified state officials that there is reasonable ground to believe that evidence of a crime may be thereby obtained. In addition, the person or persons whose communications are to be intercepted must be described with particularity. To further discourage private wire tapping, New York has recently amended its penal code to provide that it shall be a misdemeanor to possess any device commonly used for the interception of telephone communications under circumstances evincing an intent unlawfully to employ such for wire tapping.[47] These statutes attempt to serve the need [48] for laws which both encourage

but the person for whom it was intended the contents or nature of a telegraphic or telephone message or dispatch, of which contents he or she may in any manner become possessed, shall be fined not more than five hundred dollars." ALA. CODE ANN. tit. 48, § 414 (1940).

44. These statutes are discussed in detail in Rosenzweig, *The Law of Wire Tapping*, 33 CORN. L. Q. 73 (1947).

45. FLA. STAT. § 822.10 (1941).

46. N. Y. PENAL LAW § 813-a (1942).

47. "A person who has in his possession any device, contrivance, machine or apparatus designed or commonly used for wire tapping or the interception of telephone communications under circumstances evincing an intent to unlawfully use or employ or allow the same to be so used or employed for wire tapping or interception of telephone communications, or knowing the same are intended to be so used, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime, he shall be guilty of a felony." N. Y. PENAL LAW § 552-a (1949).

48. See 8 WIGMORE, EVIDENCE § 2184 b (3d ed. 1940); Plumb, *Illegal Enforcement of the Law*, 24 CORN. L. Q. 337 (1939); Comment, 53 HARV. L. REV. 863 (1940). The New York legislature has apparently agreed that wire tapping should be utilized in crime prevention by providing for supervised tapping. In 1938 a constitutional provision was adopted: "The right of the people to be secure against unreasonable interception

competent law enforcement and prevent abuse of the individual's right of privacy by unauthorized persons. As previously mentioned, Section 605 of the Federal Communications Act absolutely prohibits all wire tapping. If this provision is construed as a restriction upon state courts, the New York law providing for legalized wire tapping would be unconstitutional.[49]

The question whether the Federal Communications Act has the effect of rendering evidence obtained in violation of its provisions inadmissible in state courts has been debated.[50] The wording of the statute itself might justify the assumption that its provisions are applicable to state courts, for the clause states only that divulging information obtained by wire tapping is a criminal offense. Such divulgence, it may be argued, is unlawful even in state courts, for "to recite the contents of the message in testimony before a court is to divulge the testimony," [51] the very act seemingly prohibited by Section 605. In a well reasoned article, Bernstein points out that "the place where the criminal act occurs is of no significance even though that place happens to be a court created by a sovereign state. The federal law is not seeking to impose a rule of evidence upon the state courts. It does have this result, but it is merely the incidental and natural consequence of a crime which is a proper subject of federal legislation."[52]

The courts of California have tacitly agreed with this premise in a number of recent cases [53] in which the applicability of Section 605 was impliedly assumed but the wire tapped evidence admitted because the plaintiff, in each case, was not within the purview of the statute. In opposition are those holdings of the Maryland court [54] wherein the view has been expressed that the Federal Communications Act was not intended to limit the power of the state courts to determine the admissibility of evidence so obtained.[55]

The Maryland cases [56] denying the ability of Congress to effect procedural changes in state courts have been substantiated by holdings of other states in

---

ot telephone and telegraph communications shall not be violated, and *ex parte* orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communications, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof." N. Y. CONST., Art. I, § 12. See Note, 23 ILL. L. REV. 377 (1928) suggesting a like procedure for federal officers.

49. See Bernstein, *The Fruit of the Poisonous Tree*, 37 ILL. L. REV. 99, 108, n. 23 (1942) discussing this possibility. See also Ernst, *Detectives In Your Parlor*, New York Herald Tribune, May 29, 1949, § 8, p. 5.

50. See Bernstein, *op. cit. supra*, at 107 (1942); Rosenzweig, *op. cit.*, 33 CORN. L. Q. 73, 78 (1947), Notes, 18 N. C. L. REV. 229 (1940), 34 ILL. L. REV. 758 (1940).

51. Nardone v. United States, 302 U. S. 379, 382 (1937).

52. Bernstein, *op. cit.* 37 ILL. L. REV. 99, 108 (1942).

53. People v. Onofrio, 65 Cal. App.2d. 584, 151 P.2d 158 (1944); People v. Vertlieb, 22 Cal.2d 193, 137 P.2d 437 (1943); People v. Kelley, 22 Cal.2d 169, 137 P.2d 1 (1943), *appeal dismissed* Kelley v. State of Calif., 320 U. S. 715 (1943).

54. Hubin v. State, 180 Md. 279, 23 A.2d 706 (1942); Rowan v. State, 175 Md. 547, 3 A.2d 753 (1939); Hitzelberger v. State, 174 Md. 152, 197 Atl. 605 (1938).

55. Rowan v. State, 175 Md. 547, 3 A.2d 753 (1939).

56. See note 54 *supra*.

an analogous situation. Most authorities have held that a federal statute, requiring the use of Government stamps on particular instruments before they could be used in evidence "in any court," does not have the effect of rendering documents which fail to comply with the statutory standards inadmissible in state courts.[57] Conversely, in the leading case expressing the minority view,[58] the court, while agreeing with the proposition that Congress cannot regulate the competency of evidence in state courts, nevertheless, held that the purpose of such a stamp statute was to prevent the use of an unstamped document as evidence until the delinquent had paid his tax, not to make rules of evidence. The provision of the statute rendering unstamped documents inadmissible as evidence "in any court" does, therefore, include state as well as federal courts.

The view of the majority seems to be based upon a failure to realize that ". . . the government of the Union, though limited in its powers, is supreme within its sphere of action. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts" [59] To this effect the Sixth Article of the Constitution provides that the laws of the United States made in pursuance of the Constitution shall be binding on the judges in every state.[60] Accordingly, the Supreme Court, holding that a state court could not refuse to enforce a federal penal statute wherein Congress had specified concurrent jurisdiction in state and federal courts, stated that a policy created by Congress in the exercise of its constitutionally provided powers is as much a policy of the states as if the act had emanated from their own legislatures and should be respected in the courts of the states.[61]

In the light of these decisions, the contention that Congress cannot create rules of evidence as incident to legislation in enumerated federal fields is open to question. Indeed, Congress has created rules which have been held restrictions upon state courts. The Bankruptcy Act which prohibits the use of information disclosed in bankrupty proceedings has been held to exclude the use of such evidence in state courts.[62] Furthermore, the procedure followed

57. Davis v. Evans, 133 N. C. 320, 45 S. E. 643 (1903); Wade v. Foss, 96 Me. 230, 52 Atl. 640 (1902); Garland v. Gaines, 73 Conn. 662, 49 Atl. 19 (1901); Small v. Slocumb, 112 Ga. 279, 37 S. E. 481 (1900); Knox v. Rossi, 25 Nev. 96, 57 Pac. 179 (1899); Trowbridge v. Addoms, 23 Colo. 518, 48 Pac. 535 (1897).

58. Chartiers and Robinson Turnpike Co. v. McNamara, 72 Pa. 278 (1872).

59. McCulloch v. Maryland, 4 Wheat. 316, 405 (1819).

60. U. S. CONST. Art. VI § 2 provides, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." In accord, it has been held that substantive rights acquired under a federal law are enforceable in both state and federal courts. Testa v. Katt, 330 U. S. 386 (1947); Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211 (1915). *Accord*: McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230 (1934).

61. Mondou v. New York, N. H. & H. R. Co. (Second Employer's Liability Cases), 223 U. S. 1 (1911). *Accord*: Testa v. Katt, 330 U. S. 386 (1947); Clafin v. Houseman, 93 U. S. 130 (1876); Tennessee v. Davis, 100 U. S. 257 (1879).

62. People v. Lay, 193 Mich. 17, 159 N. W. 299 (1916).

in state courts has been regulated under the Federal Employer's Liability Act.[63]

III

Conclusion

A recent discussion in the *Yale Law Journal*[64] between J. Edgar Hoover, Director of the Federal Bureau of Investigation, and Profs. Emerson and Helfeld of the Yale Law School has attracted wide attention. Statements by the latter that agents of the F. B. I. were reputedly engaging in wire tapping[65] were admitted as true by Mr. Hoover,[66] with the defense that such tapping was done only in cases involving espionage, sabotage, grave risks to internal security, or when human lives were in jeopardy.

The more specific question of the applicability of Section 605 to the various state courts arose in a New York case[67] which received nationwide publicity. Professional gamblers were convicted by the use of wire tapped evidence, secured in conformity with the state statute, of the attempted bribery of two members of the New York Giants professional football team, Merle Hapes and Frank Filchock. The constitutionality of the New York statute was challenged by the defendants in an appeal to the Supreme Court, thus placing the applicability of 605 to the states squarely in issue. But the situation is still unclarified, for in a four-four decision the ruling of the lower court was affirmed without comment.[68]

It is clear, then, that Section 605, as of this date, has not terminated wire tapping either by federal agents or state officers. The final word as to its ultimate effect in this direction still remains with the Supreme Court.

Irving Peskoe
Robert H. Slatko

63. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U. S. 520 (1930); Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1 (1911).

64. Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1 (1948); Hoover, *A Comment of the Article "Loyalty Among Government Employees,"* 58 Yale L. J. 401 (1949); Emerson and Helfeld, *Reply By the Authors*, 58 Yale L. J. 412 (1949); Hoover, *Rejoinder by Mr. Hoover*, 58 Yale L. J. 422 (1949).

65. Emerson and Helfeld, *op. cit. supra*, at 71.

66. Hoover, *op. cit. supra*, at 405.

67. People v. Stemmer, 298 N. Y. 728, 83 N. E.2d 141 (1948), *cert. granted* 69 Sup. Ct. 811 (1949).

68. Miami Herald, May 4, 1949, p. 12, col. 4.