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Constitutional Law--Wiretapping--Use of Electronic Eavesdropping Device Held Not a Violation of Fourth Amendment or Section 605 of the Federal Communications Act (United States v. Silverman, 166 F. Supp. 838 (D.D.C. 1958))

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methods of exercising jurisdiction over those now covered by article 2(11), are the considerations which the concurring opinions of Justices Frankfurter and Harlan in *Covert* would hold to be determinative of the court-martial question.[30] It is therefore felt that the facts in the present case provide the strongest ground upon which those Justices who hold the flexible view could take a position favorable to article 2(11). In order for such a position to be taken, article 2(11) would have to be found severable and valid as to those properly subject to court-martial jurisdiction.

Other federal cases[31] decided since the principal case have avoided the severability dilemma in which the present Court found itself by refusing to extend the *Covert* case beyond its holding of the invalidity of article 2(11) as applied to a dependent[32] (a "person accompanying"). Those courts then simply upheld military jurisdiction over the whole of "persons employed by" while discarding "persons accompanying." [33]

Regardless of which view prevails in the Supreme Court, the advantages of a determination on the constitutional merits, with a resultant clarification of the exact nature of the constitutional guarantees afforded Americans overseas, are obvious. Either a workable retention of military jurisdiction under article 2(11) will result, or remedial legislation with a definitive judicial guide as to the bounds of congressional power in the area can be attempted.

CONSTITUTIONAL LAW — WIRETAPPING — USE OF ELECTRONIC EAVESDROPPING DEVICE HELD NOT A VIOLATION OF FOURTH AMENDMENT OR SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT.—

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[30] Reid v. Covert, 354 U.S. 1, 44-49 (Frankfurter, J., concurring), 75-77 (Harlan, J., concurring).

[31] Grisham v. Taylor, 261 F.2d 204 (3d Cir. 1958); *In re* Yokoyama, 170 F. Supp. 467 (S.D. Cal. 1959).

[32] Grisham v. Taylor, *supra* note 31, at 205. "Granted that authority compels the conclusion that a wife accompanying her husband abroad is not to be tried by court-martial, it does not follow that persons 'serving with' or 'employed by' the armed forces may not be so tried." *Ibid.* *Accord, In re* Yokoyama, *supra* note 31, at 471, 476. *But cf.* United States *ex rel.* Singleton v. Kinsella, 164 F. Supp. 707 (S.D.W. Va. 1958), where a *dependent* convicted of a *non-capital* offense was held not to be subject to trial by court-martial. In this case probable jurisdiction was noted. 3 L. Ed. 2d 569 (1959). The case was transferred to the summary calendar and set for argument immediately following the principal case. 27 U.S.L. WEEK 3236 (U.S. Feb. 24, 1959) (No. 571).

[33] Grisham v. Taylor, *supra* note 31, at 205; *In re* Yokoyama, *supra* note 31, at 476.

Defendants were indicted for violation of the gambling statutes of the District of Columbia. The affidavit seeking the search warrant was based on information obtained by the use of an electronic device which protruded about six or eight inches into the party wall of the searched premises. The Court denied defendants' motion to suppress the evidence, *holding* that the fourth amendment and section 605 of the Federal Communications Act (federal anti-wiretap statute) were not violated. The information obtained pursuant to the search warrant was thus admissible in evidence. *United States v. Silverman*, 166 F. Supp. 838 (D.D.C. 1958).

Eavesdropping was considered at common law to be an indictable offense.[1] New York adopted its first eavesdropping statute in 1881, whereby loitering with intent to overhear and repeat a private conversation was a misdemeanor.[2] In 1892, section 1423 of the Penal Law formally forbade wiretapping.[3] An amendment to the New York constitution, guaranteeing against unreasonable interception of telephone and telegraph communications,[4] was approved in 1938. However, the amendment authorized a system of lawful interception under certain prescribed conditions.[5] Section 813-a of the Code of Criminal Procedure, adopted in 1942, provided the procedure for obtaining the required judicial authorization.[6] Later statutes prohibited connivance with a telephone or telegraph company employee[7] and made it a misdemeanor to possess wiretap equipment with intent to use it illegally.[8] In 1950 another area of "legal" wiretapping was opened up by the decision in *People v. Applebaum*, which sustained the right of a telephone subscriber to tap his own line.[9] Such was the New York situation prior to 1957.

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[1] 4 BLACKSTONE, COMMENTARIES 169 (1769); WHARTON, CRIMINAL LAW § 1718 (12th ed. 1932).

[2] Former § 721 of the N.Y. Penal Law prohibited eavesdropping by loitering. It stated that "a person who secretly loiters about a building, with intent to overhear discourse therein, and to repeat or publish the same to vex or annoy . . . others, is guilty of a misdemeanor." Section 721 was repealed by N.Y. Sess. Laws 1957, ch. 881, § 5.

[3] Pursuant to the eavesdropping legislation of 1957, § 1423(6) of the N.Y. Penal Law was amended, and all references to wiretapping were deleted. N.Y. Sess. Laws 1957, ch. 881, § 2.

[4] N.Y. CONST. art. 1, § 12.

[5] *Ibid.*

[6] N.Y. CODE CRIM. PROC. § 813-a.

[7] Section 552 of the N.Y. Penal Law was repealed by N.Y. Sess. Laws 1957, ch. 881, § 1. This statute has been substantially re-enacted as § 743 of the Penal Law.

[8] Section 552-a of the Penal Law was repealed by N.Y. Sess. Laws 1957, ch. 881, § 1. This section is now covered in § 742 of the Penal Law.

[9] 277 App. Div. 43, 97 N.Y.S.2d 807 (2d Dep't), *aff'd mem.*, 301 N.Y. 738, 95 N.E.2d 410 (1950).

Prompted by the findings of the Savarese Committee,[10] the New York Legislature in 1957 enacted important eavesdropping statutes. Article 73 of the Penal Law prohibited unauthorized wiretapping and electronic eavesdropping [11] and brought within the purview of the section the subscriber to the telephone or telegraph service involved.[12] This change abolished the so-called "legal" wiretap area created by the *Applebaum* decision. The second important change was an amendment to the Civil Practice Act which made inadmissible in a civil action evidence obtained by any act of eavesdropping in violation of the new laws.[13] Sections 813-a [14] and 813-b [15] of the Code of Criminal Procedure were also amended in 1957 and 1958 so as to require the court to satisfy itself of the existence of reasonable grounds for granting an order permitting wiretapping or eavesdropping by police officers. The 1957 amendments also reduced from six to two months the effective period of these orders.

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[10] 1956 LEG. DOC. No. 53, REPORT, N.Y. STATE JOINT LEGISLATIVE COMM. TO STUDY ILLEGAL INTERCEPTION OF COMMUNICATIONS (1956).

[11] Section 783 of article 73 of the Penal Law defines eavesdropping as following:

"A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures, or permits another to do so, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to do so, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to do so; is guilty of eavesdropping."

[12] Section 741 of article 73 defines "person" as ". . . any individual, partnership, corporation or association *including* the subscriber to the telephone or telegraph service involved and any law enforcement officer." (Emphasis added.) The latter part, including police officers within the purview of the section, was added in 1958. N.Y. Sess. Laws 1958, ch. 675, § 1.

[13] N.Y. CIV. PRAC. ACT § 345-a, added by N.Y. Sess. Laws 1957, ch. 880, § 1. The material portion is as follows: "Evidence obtained by any act of eavesdropping, as defined in section seven hundred thirty-eight of the penal law, or by any act in violation of section eight hundred thirteen-b of the code of criminal procedure, . . . shall be inadmissible . . . in any civil action . . . provided, however, that any such evidence shall be admissible in any disciplinary trial or hearing or in any administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency."

[14] N.Y. Sess. Laws 1957, ch. 879, § 1, as amended, N.Y. Sess. Laws 1958, ch. 676, § 1.

[15] N.Y. Sess. Laws 1957, ch. 879, § 2, as amended, N.Y. Sess. Laws 1958, ch. 676, § 1.

In 1958, section 741 of the Penal Law was further amended to prohibit police officers from eavesdropping without a court order.[16] Section 813-b of the Code of Criminal Procedure provides for an exception which permits an officer to employ an electronic eavesdropping device where there is not sufficient time to obtain a court order.[17] However, this exception does not apply to wiretapping.

The recent legislation did not remedy the arbitrary New York rule on the admissibility of illegally obtained wiretapping and eavesdropping evidence.[18] New York continues to exclude such evidence in civil trials [19] but permits it in criminal trials.[20]

The stage had been set for federal legislation in the field of wiretapping in 1928, after the 5-to-4 decision in the *Olmstead* case.[21] There the United States Supreme Court held that wiretapping did not violate the fourth amendment because it did not constitute an illegal search or seizure.[22] Hence evidence obtained thereby was admissible in federal courts. In 1934 Congress enacted section 605 of the Federal Communications Act [23] which the courts construed to specifically prohibit wiretapping.[24] It was later held that any evidence secured in violation of section 605 is not admissible in federal courts.[25] The scope of this section was further extended to apply to intrastate as well as to interstate communications.[26] But to constitute a violation under this section there must usually be a physical interception of the telephone system.[27]

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[16] N.Y. Sess. Laws 1958, ch. 675, § 1.

[17] N.Y. Sess. Laws 1958, ch. 676, § 1.

[18] See N.Y. CIV. PRAC. ACT § 345-a.

[19] *Ibid.*

[20] People v. Grant, 14 Misc. 2d 182, 179 N.Y.S.2d 384 (Ct. Gen. Sess. 1958). See proposed amendment to N.Y. CIV. PRAC. ACT § 345-a, whereby illegally obtained wiretap and eavesdropping evidence would have been inadmissible in criminal as well as civil trials. 1957 LEG. DOC. No. 29, REPORT, N.Y. STATE JOINT LEGISLATIVE COMM. TO STUDY ILLEGAL INTERCEPTION OF COMMUNICATIONS 25 (1957). Governor Harriman vetoed this bill on March 18, 1957. *Id.* at 26.

[21] Olmstead v. United States, 277 U.S. 438, 465 (1928).

[22] *Id.* at 466.

[23] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952). Section 605 reads in part as follows: "[N]o 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. . . ."

[24] Nardone v. United States, 302 U.S. 379 (1937) (§ 605 held to expressly forbid federal agents from testifying in court as to substance of messages they had intercepted).

[25] Nardone v. United States, 308 U.S. 338 (1939) (derivative use of intercepted messages also excluded as being ". . . a fruit of the poisonous tree." *Id.* at 341).

[26] Weiss v. United States, 308 U.S. 321 (1939).

[27] See Goldman v. United States, 316 U.S. 129 (1942) (listening device attached to wall did not constitute interception). In the *Goldman* case a telephone message was overheard from the next room by means of an electronic

A problem has arisen in this area concerning the admissibility in state courts of wiretap evidence obtained according to state statutes. In *Wolf v. Colorado* [28] it was held that the admissibility of illegally obtained evidence in state courts is a matter of state law. Following this decision the Court in *Schwartz v. Texas* [29] construed section 605 as not having been intended to impose a rule of evidence on state courts. Thus, evidence procured in violation of the federal wiretap statute was not rendered inadmissible in a state trial. The now-famous case of *Benanti v. United States,*[30] however, has occasioned some doubt whether Congress has pre-empted the wiretapping field, thereby making evidence obtained in compliance with local statutes [31] inadmissible in the state courts. The rule of the *Schwartz* case [32] is still the New York view as set forth in *People v. Grant.*[33]

Despite the pleas of lawyers [34] and legislators [35] there has been a great deal of apathy in attempts to enact federal legislation against electronic eavesdropping. Whereas the federal government has been involved primarily in the wiretapping area,[36] New York is ahead

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device; this can be distinguished from the instant case where an oral conversation was intercepted. *But see* United States v. Hill, 149 F. Supp. 83 (S.D.N.Y. 1957) (use of microphone held above telephone receiver was interception of communication in violation of § 605 regardless of whether microphone touched receiver).

[28] 338 U.S. 25 (1949). Although the fourth amendment had been interpreted as forbidding the admissibility of illegally obtained evidence in the federal courts, the fourteenth amendment was held not to preclude the passage of a state statute allowing admission of such evidence in a state court. *Id.* at 33.

[29] 344 U.S. 199 (1952).

[30] 355 U.S. 96 (1957). There the Court said as follows: "[W]e find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section. . . ." *Id.* at 105. New York Supreme Court Justice Hofstadter has interpreted the *Benanti* decision as prohibiting the issuance by judges of any wiretap orders under N.Y. CODE CRIM. PROC. § 813-a. Matter of Interception of Tel. Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958). *But see* Schwartz v. Texas, 344 U.S. 199 (1952).

[31] See, *e.g.,* N.Y. CODE CRIM. PROC. §§ 813-a, 813-b.

[32] Schwartz v. Texas, *supra* note 30.

[33] 14 Misc. 2d 182, 179 N.Y.S.2d 384 (Ct. Gen. Sess. 1958). See text accompanying note 20 *supra.*

[34] Gerhart, *Let's Take the Hypocrisy Out of Wiretapping,* 30 N.Y.S. BAR BULL. 268 (1958).

[35] Senator Keating recently introduced eavesdropping legislation which would make unauthorized eavesdropping a federal criminal offense if it occurred in any area under federal jurisdiction. The bill also contains provisions for lawful eavesdropping by law enforcement agencies. Another important provision would remove the doubts concerning the *Benanti* decision and make it clear that evidence obtained by authorized state wiretapping would be admissible in federal and state courts. 105 CONG. REC. 2943 (daily ed. March 5, 1959).

[36] See 48 Stat. 1104 (1934), 47 U.S.C. § 605 (1952); Benanti v. United States, 355 U.S. 96 (1957); Weiss v. United States, 308 U.S. 321 (1939);

in the field of electronic eavesdropping legislation.[37] The advances in modern electronic instruments make the federal position difficult to understand. Since the results accomplished are the same,[38] the distinction between wiretapping and eavesdropping would appear to have become academic. This is illustrated by a comparison of the principal case with *United States v. Hill*.[39] In the latter, there was dicta to the effect that holding a microphone close to a telephone receiver without physically touching it would be a violation of section 605. In the principal case the fact that no telephone communication was involved removed it from the purview of the wiretap statute. Hence, it seems that whether the methods employed are legal or illegal turns on a mere technicality. Such a situation makes it imperative that Congress enact legislation which will govern the area of electronic eavesdropping and thus serve to complement section 605. Such legislation should specifically permit wiretapping by federal officers under court order.[40] A similar provision should be added to section 605.

An improvement can be made in New York legislation by excluding illegally obtained eavesdropping and wiretapping evidence in criminal as well as in civil trials. Such an amendment will not hinder lawful eavesdropping but will act as a positive deterrent against police officers illegally eavesdropping to obtain information which they know will be admitted in criminal trials. It scarcely needs to be said that police officers should not be permitted to violate the very laws they are sworn to uphold.[41]

CONTRACTS—STATUTE OF FRAUDS—DEFENSE HELD NOT AVAILABLE WHERE GOODS WERE SPECIALLY MANUFACTURED FOR SELLER BY THIRD PARTY.—Plaintiff-seller ordered special window frames to be manufactured by a third party in order to fill plaintiff's oral con-

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Nardone v. United States, 308 U.S. 338 (1939); Nardone v. United States, 302 U.S. 379 (1937).

[37] See text accompanying notes 11 and 12 *supra*.

[38] The report states: "In purpose and result, of course, the . . . act here involved [electronic eavesdropping] is exactly the same as the recognized felony of wiretapping." 1957 LEG. DOC. NO. 29, REPORT, N.Y. STATE JOINT LEGISLATIVE COMM. TO STUDY ILLEGAL INTERCEPTION OF COMMUNICATIONS 15 (1957).

[39] 149 F. Supp. 83 (S.D.N.Y. 1957).

[40] See Senator Keating's proposed legislation on this point. 105 CONG. REC. 2943 (daily ed. March 5, 1959).

[41] Gerhart, *Let's Take the Hypocrisy Out of Wiretapping*, 30 N.Y.S. BAR BULL. 268, 274 (1958).