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## Criminal Law - Evidence - Wiretapping

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CRIMINAL LAW—EVIDENCE—WIRETAPPING—Suspecting that petitioner and others were violating state narcotics laws, New York police tapped petitioner's telephone pursuant to a warrant obtained in accordance with New York law.<sup>1</sup> Acting upon information thus gained the police apprehended petitioner's brother. In his possession was found, not the narcotics as suspected, but alcohol without the tax stamps required by federal law.<sup>2</sup> This evidence was turned over to federal authorities. Prosecution for possessing and transporting distilled spirits without tax stamps thereon followed, during which petitioner's motion to suppress the evidence obtained through the wiretap was denied. The Second Circuit affirmed the conviction,<sup>3</sup> holding that although the evidence was obtained in violation of section 605 of the Federal Communications Act,<sup>4</sup> it was admissible. On certiorari to the United States Supreme Court, *held*, reversed. Evidence obtained solely by state agents in violation of section 605 is inadmissible in federal courts. *Benanti v. United States*, 355 U.S. 96 (1957).

In a companion case, a person expecting a threatening telephone call from petitioner requested state police to listen in over a regularly installed extension telephone. They did so, and the testimony of those officers as to the conversation was admitted on the petitioner's trial for violating federal law.<sup>5</sup> His conviction was affirmed by the Tenth Circuit.<sup>6</sup> On certiorari to the United States Supreme Court, *held*, affirmed, two justices dissenting.<sup>7</sup> Section 605 was not violated because there was no "interception" within the meaning of the statute. Thus the testimony was admissible. *Rathbun v. United States*, 355 U.S. 107 (1957).

Section 605 is essentially a proscriptive provision, forbidding the interception and divulgence of a communication. It can be criminally<sup>8</sup> and civilly<sup>9</sup> enforced. The plain language of the second clause<sup>10</sup> renders it naturally suitable as an exclusionary rule of evidence.<sup>11</sup> As a rule of evidence, it does not supersede contrary state rules in state court proceed-

<sup>1</sup> N.Y. CONST., Art. I, §12; N.Y. Code of Criminal Procedure §813-a (1942).

<sup>2</sup> In violation of I.R.C., §§5008(b)(1) and 5642.

<sup>3</sup> *United States v. Benanti*, (2d Cir. 1957) 244 F. (2d) 389.

<sup>4</sup> 48 Stat. 1103 (1934), 47 U.S.C. (1952) §605.

<sup>5</sup> Rathbun was convicted of transmitting a threatening interstate communication in violation of 18 U.S.C. (1952) §875(b) and (c).

<sup>6</sup> *Rathbun v. United States*, (10th Cir. 1956) 236 F. (2d) 514.

<sup>7</sup> Justice Frankfurter and Douglas argued that there was an "interception" unauthorized by "the sender."

<sup>8</sup> *United States v. Gruber*, (2d Cir. 1941) 123 F. (2d) 307.

<sup>9</sup> *Reitmeister v. Reitmeister*, (2d Cir. 1947) 162 F. (2d) 691.

<sup>10</sup> "[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. . . ."

<sup>11</sup> Section 605 was originally applied as a rule of evidence in *Nardone v. United States*, 302 U.S. 379 (1937).

ings.<sup>12</sup> Its application in federal courts, however, prohibits both testimony as to the substance of an intercepted message<sup>13</sup> and evidence obtained as the "fruit" of such an interception, at least when the existence of the wiretap has been disclosed.<sup>14</sup> The exclusionary rule applies to intrastate as well as interstate messages.<sup>15</sup>

In deciding the *Benanti* case below,<sup>16</sup> the Second Circuit approved the evidence offered, relying on a Supreme Court intimation that evidence obtained in violation of section 605 should be accorded the same treatment as evidence obtained in violation of the Fourth Amendment.<sup>17</sup> It was reasoned that Fourth Amendment considerations<sup>18</sup> apparently permit the introduction in a federal prosecution of evidence obtained solely by state authorities in a search and seizure unconstitutional under the Fourteenth Amendment,<sup>19</sup> at least where federal officers do not cooperate,<sup>20</sup> and when the search is not solely to enforce federal law.<sup>21</sup> Since neither of these latter two considerations was present it followed that state-secured evidence obtained in violation of section 605 should also be admissible, and sixteen decisions, in seven of which certiorari had been denied, were cited to that effect. The Court nevertheless found the statute to require a contrary result, and went out of its way to observe: "It has remained an open question in this Court whether evidence obtained solely by state

<sup>12</sup> *Schwartz v. Texas*, 344 U.S. 199 (1952). But see *Matter of Interception of Telephone Communications*, 170 N.Y. S. (2d) 84 (1958), where a memorandum opinion apprised enforcement and prosecuting officers that authorizing orders for wiretapping within New York would henceforth be denied notwithstanding the state statute. The court based its decision on a holding that the *Benanti* case and §605 are the supreme law of the land. The court says, "[Benanti] tolls the knell of all wiretapping, including so-called 'legal' wiretapping, in our State." *People v. Dinan*, 172 N.Y.S. (2d) 496 (1958), where a lower New York court indicates that *Benanti* may have changed the result on the *Schwartz* facts; *Burack v. State Liquor Authority*, (E.D. N.Y. 1958) 160 F. Supp. 161, where the federal court relied upon *Benanti* to enjoin the use of state wiretap evidence before a state administrative tribunal.

<sup>13</sup> *Nardone v. United States*, note 11 *supra*.

<sup>14</sup> *Nardone v. United States*, 308 U.S. 338 (1939). But see the *Benanti* case at 100, note 5.

<sup>15</sup> *Weiss v. United States*, 308 U.S. 321 (1939).

<sup>16</sup> *Benanti v. United States*, note 3 *supra*.

<sup>17</sup> "Although the unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Fourth Amendment, we have applied the same policy in respect of the prohibitions of the Federal Communications Act. . . ." *Goldstein v. United States*, 316 U.S. 114 at 120 (1942).

<sup>18</sup> It is generally assumed that the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914), is not required by the Fourth Amendment, although this question remains open. See Justice Black's concurring opinion in *Wolf v. Colorado*, 338 U.S. 25 at 39 and 40 (1949).

<sup>19</sup> See *Byars v. United States*, 273 U.S. 28 (1927); *Lustig v. United States*, 338 U.S. 74 (1949). The prohibition against unreasonable searches and seizures although not the *Weeks* exclusionary rule have been read into the Fourteenth Amendment as restrictions on the states. *Wolf v. Colorado*, note 18 *supra*.

<sup>20</sup> See *Byars v. United States*, note 19 *supra*; *Lustig v. United States*, note 19 *supra*.

<sup>21</sup> *Gambino v. United States*, 275 U.S. 310 (1927).

agents in an illegal search may be admissible in federal court despite the Fourth Amendment."<sup>21a</sup> Therefore the real significance of the *Benanti* case may be to portend a change in the previously understood scope of the Fourth Amendment.

Section 605 clearly condemns the "interception" and divulgence of a communication, unless authorized by "the sender."<sup>22</sup> Prior to the *Rathbun* case, lower federal courts had indicated that both parties to a telephone conversation were alternately senders and receivers, and that authorization by both was therefore necessary to remove an interception from the proscription of the statute.<sup>23</sup> Other lower courts had indicated that where a third party overhears a conversation on an extension telephone with the consent of one party, there is no "interception" within the meaning of the statute.<sup>24</sup> The Court accepted the latter position, therefore avoiding the problem of who is a "sender," arguing that Congress could not have intended that the word "interception" included the normal business and social practice of allowing third parties to listen in on extension telephones.<sup>25</sup> This result seems sound. Since the recipient of the phone call here could testify to its contents, keeping a police officer who overheard the conversation from testifying would only prevent corroboration of the recipient's testimony, and could not prevent disclosure of the contents of the conversation.<sup>26</sup> This same consideration would suggest that evidence obtained with consent of one party by use of a device other than an extension telephone should also be admissible. If such a device were used, however, the Court might have more difficulty in finding no "interception," and would then face the problem of who is a "sender."<sup>27</sup> Finding any listening-in consented to by either party to the conversation, regardless of the method used, not to be an "interception" would avoid this problem, and would seem to be both a permissible and desirable construction of the statute.

The two cases seem to complement each other. *Benanti* protects the individual from invasion of the privacy of his telecommunications by state agents, at least to the extent that federal exclusionary rules of evidence may do so. *Rathbun*, however, makes clear that such protection will be accorded only in cases where the individual's privacy is in fact threatened

<sup>21a</sup> *Benanti* case at 102, note 10.

<sup>22</sup> Note 10 *supra*.

<sup>23</sup> E.g., *United States v. Polakoff*, (2d Cir. 1940) 112 F. (2d) 888; *United States v. Hill*, (S.D. N.Y. 1957) 149 F. Supp. 83.

<sup>24</sup> E.g., *United States v. White*, (7th Cir. 1956) 228 F. (2d) 832; *Flanders v. United States*, (6th Cir. 1955) 222 F. (2d) 163.

<sup>25</sup> *Rathbun* case at 109 to 111.

<sup>26</sup> It is assumed that a caller or recipient of a call who would request the police to listen in on a conversation would also be willing to testify in court, although the same rule should follow even if he would not do so because of, for example, fear or intimidation.

<sup>27</sup> Section 605 incorporated into the Federal Communications Act the almost identical provision found in the Federal Radio Act of 1927, 44-2 Stat. 1172, thus explaining the presence of the words "sender" and "intercept."

*by the wiretap*, which is not normally the case when state police are requested to monitor the conversation by the other party, who can testify to its contents.<sup>28</sup> The results in both cases, therefore, can be commended.

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<sup>28</sup> See note 26 *supra*.