EXCLUSION OF EVIDENCE OBTAINED BY WIRE TAPPING: AN ILLUSORY SAFEGUARD*

THOUGH often criticized as a police-state tactic, wire tapping has frequently been employed by law enforcement officers to ease the gathering of evidence against suspects.[1] To curb tapping by federal agents, the Supreme Court fifteen years ago construed the Communications Act of 1934 to forbid the admission in federal criminal trials of evidence secured by tapping a defendant's telephone.[2] In the second *Nardone* case, the Court bolstered this anti-wire tap policy by also excluding indirect evidence obtained from wire tap leads.[3] Trial courts administer this exclusionary rule by examining the government's evidence in a hearing held out of the jury's presence. Once a defendant proves that his wires have been tapped, the judge must give the defendant an oppor-

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*United States v. Frankfeld, 100 F. Supp. 934 (D. Md. 1951).

1. For criticism of wire tapping, see Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 476 (1928); BARTH, THE LOYALTY OF FREE MEN 182 (Pocket Book ed. 1952): "If wire tapping is an aid to the police in frustrating foreign agents, so is rifling the mails, so is unrestricted search of private homes, so is summary arrest on suspicion—the ominous knock on the door by night that came to be the symbol of the Gestapo's terror. A great deal could be learned about crime by putting recording devices in confessionals and in physicians' consulting rooms, by compelling wives to testify against their husbands, by encouraging children to report the dangerous thoughts uttered by their parents. The trouble with these techniques, whatever their utility in safeguarding national security, is that a nation which countenances them ceases to be free." See 8 WIGMORE, EVIDENCE § 2184b (3d ed. 1940) for a defense of wire tapping. See generally Rosenzweig, *The Law of Wiretapping*, 32 CORNELL L. Q. 514, 33 *id.* 73 (1947).

2. Nardone v. United States, 302 U.S. 379 (1937). The statute reads in part: "[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 communications to any person. . . ." 48 STAT. 1103 (1934), 47 U.S.C. § 605 (Supp. 1951). In Olmstead v. United States, 277 U.S. 438 (1928), the Supreme Court, Justices Holmes, Brandeis, Stone and Butler dissenting, had held that wire tapping is not an unconstitutional search and seizure within the meaning of the Fourth Amendment. Thus Congress is entirely free to deal with wire tapping as it wishes.

The *Nardone* decision has been vigorously attacked. See, *e.g.*, Notes, 6 GEO. WASH. L. REV. 326 (1938); 53 HARV. L. REV. 863 (1940); 86 U. OF PA. L. REV. 436 (1938). Critics stressed: (1) that the 1934 Act merely extended a similar prohibition of the Federal Radio Commission Act of 1927 to wire communications, and that the latter statute had never been regarded as forbidding government interception; (2) that a bill expressly intended to forbid government wire tapping had failed to pass the House of Representatives in 1929, and that no mention of such prohibition appears in any later congressional debates; and (3) that in the absence of specific provisions to the contrary, general words of a statute such as "no person" are not to be interpreted as applying to the sovereign. But fifteen years of congressional failure to amend the statute strengthens the Court's original interpretation.

3. Nardone v. United States, 308 U.S. 338 (1939). The first *Nardone* decision, Nardone v. United States, 302 U.S. 379 (1937), had ruled only on the exclusion of actual transcripts of intercepted messages.

tunity to show a connection between the taps and the government's evidence.[4] The government then has the burden of proving that none of its evidence derived directly or indirectly from wire tapping;[5] evidence not cleared of suspicion is inadmissible at the trial.[6] Repeated congressional refusals to amend the Act and thus sanction federal wire tapping suggest tacit legislative approval of the Court's firm policy.[7]

The *Nardone* rule has not, however, effectively deterred government use of wire tap evidence. Despite continued Justice Department wire tapping—particularly in subversive activities cases[8]—only four wire tap hearings have been reported.[9] The major barrier to securing the hearing has been the necessity of proving that a wire tap occurred. Without such a showing, no hearing need be held and the government is free to use evidence gained from taps. And since wire tapping is not easily detected,[10] it may be unusually

4. "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire tapping was unlawfully employed. Once that is established . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." Nardone v. United States, 308 U.S. 338, 341 (1939).

5. This is not explicit in the *Nardone* holding. See note 4 *supra*. But in United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941), Judge Learned Hand interpreted the Supreme Court's language to require the government, when tapping has been shown, to prove that its evidence was obtained from independent sources. Judge Hand stressed that only the government could ordinarily know the source of its proof. The Supreme Court affirmed the decision, but found it unnecessary to rule on burden of proof. Goldstein v. United States, 316 U.S. 114 (1942).

6. United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952).

7. Several bills authorizing government wire tapping were introduced almost immediately after the *Nardone* decision. See, *e.g.*, S. 3756, 75th Cong., 3d Sess. (1938). More recent proposals are, *e.g.*, S. 595 and H.R. 3563, 81st Cong., 1st Sess. (1949). All of these bills were actively supported by the Federal Bureau of Investigation, see LOWENTHAL, THE FEDERAL BUREAU OF INVESTIGATION 323-6 (1950), but none passed. See Comment, 2 STAN. L. REV. 744 (1950).

8. "It is no secret that the FBI does tap telephones in a very limited type of cases with the express approval in each instance of the Attorney General of the United States, but only in cases involving espionage, sabotage, grave risks to internal security, or when human lives are in jeopardy." J. Edgar Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 58 YALE L. J. 401, 405 (1949).

9. United States v. Weiss, 34 F. Supp. 99 (S.D.N.Y. 1940); Goldman v. United States, 316 U.S. 129 (1940); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952); United States v. Lewis, 87 F. Supp. 970 (D. D.C. 1950). It is unlikely that many unreported hearings have taken place. None have come to the attention of the Administrative Office of the United States Courts. Communication to the YALE LAW JOURNAL from W. H. Speck, Attorney, Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, dated February 25, 1952, on file in Yale Law Library.

10. Technological improvements in wire tap apparatus have eliminated the crackling noises that once gave warning of wire tapping. See Berger, *Tapping the Wires*, The New Yorker, June 18, 1938, p. 41.

difficult to prove. Moreover, defense questioning of government witnesses to determine if wires have been tapped is not permitted.[11] In the four reported hearings, proof of the tap was obtained fortuitously. In one, the government had introduced wire tap transcripts at a previous trial.[12] In two others, unusual circumstances gave defendants notice of the tapping.[13] In the fourth, an FBI witness at the trial inadvertently mentioned that defendant's phone had been tapped.[14]

The difficulties of proving that wire tapping took place were recently demonstrated in *United States v. Frankfeld*.[15] In moving for a pre-trial wire tap hearing,[16] defendants submitted affidavits relating several incidents in

11. See, *e.g.*, Transcript of Record, p. 2312, Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952). Objections to such questions are sustained on the ground that no wire tap discussion can proceed until the defense first proves the tap. See, *e.g., id.* at 706-7, 2312, 3928, 6652, 7281, 7328.

12. United States v. Weiss, 34 F. Supp. 99 (S.D.N.Y. 1940). Thinking that the congressional ban did not apply to the communications in question, the Government introduced the transcripts at Weiss' first trial. On remand from the Supreme Court, United States v. Weiss, 308 U.S. 321 (1939), a pre-trial hearing was held. The hearing mentioned in Goldstein v. United States, 120 F.2d 485 (2d Cir. 1941), is an extension of the Weiss hearing, under a new name because of the withdrawal of Weiss, on a plea of guilty, from the case.

13. Goldman v. United States, 316 U.S. 129 (1940), involved the use of what was later held to be a non-wire tapping instrumentality. In seeking to attach a detectaphone —a sensitive sound-receiving apparatus—to the adjoining wall of defendants' offices, FBI agents were forced to enlist the aid of building superintendents. The superintendents later informed defendants of what had transpired, and a hearing was obtained. See affidavits of Harry Raynor, Albert E. Frost, and George Fetherston, Transcript of Record, pp. 33-40. In United States v. Lewis, 87 F. Supp. 970 (D. D.C. 1950), United States Marshals raided a gambling establishment, and answered incoming phone calls in the course of arrest. Although a pre-trial hearing was held, the district court was unconvinced that such interception constituted wire tapping.

14. United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952). See Note, 60 YALE L.J. 736 (1951). Caught unaware by a wire tap question, the FBI witness blurted out his answer before government attorneys could object. Communication to the YALE LAW JOURNAL from defense counsel Archibald Palmer, dated March 18, 1952, on file in Yale Law Library. The incident does not appear in the record, but its aftermath may be found on pp. 133-7 of Stenographer's Minutes, United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).

15. 100 F. Supp. 934 (D. Md. 1951). Defendants were indicted for violation of the Smith Act, 54 STAT. 670 (1940), 18 U.S.C. § 2385 (Supp. 1951).

16. Defendants' petition asked, in addition to the hearing, that the government be made to remit to them "all discs, records, logs, transcripts and notes of . . . intercepted telephonic communications, all reports concerning or mentioning such intercepted communications, and the names, addresses, and official titles of all employees and agents of the United States who participated in intercepting, noting, reporting on, or acting upon any such intercepted communications"; that all evidence obtained through wire tap methods be suppressed; and that the indictment be dismissed if hearings determined that it was obtained on evidence illegally secured. Motion for Suppression of Evidence and Other Appropriate Relief, United States v. Frankfeld, copy on file in Yale Law Library.

which FBI knowledge of their movements was apparently secured through wire tapping.[17] In one situation, there were hints that the defense counsel's phone had also been tapped.[18] But in no instance could defendants prove conclusively that there had been taps. In answer to the affidavits, the government declared that no wire tap evidence would be introduced at the trial. Significantly, the prosecution did not deny that wires had been tapped.[19]

The court refused to order the hearing. It held that the defendants had failed to show that there had actually been wire tapping. The circumstantial evidence fell short of "solidity" and revealed "an entire lack of definiteness."[20] To order a hearing on such a faulty showing, the court said, would serve only to reveal the government's case. Moreover, the court thought that the hearing would serve no useful purpose in view of the government's assurance that no wire tap evidence would be introduced.[21]

The rigorous burden of proof the *Frankfeld* court imposed on defendants is not necessarily required by *Nardone*. Although it admonished trial courts to prevent "tenuous claims" from impeding "the rigorous administration of justice,"[22] the Supreme Court left case-to-case decisions to the sound discretion of the trial judge.[23] Moreover, the context of the Court's admonition

17. "On or about July 31, 1951 . . . I made an appointment to see [a] client at her home on North Bond Street at about 5:00 P. M. The address was repeated over the telephone. . . . When I left my office . . . I was followed by two cars driven by Federal Bureau of Investigation agents. However . . . I lost them in traffic. When I realized that I was not being followed, I decided to check to make sure in my own mind as to whether or not the Federal Bureau of Investigation was using a wire tap on my telephone. I drove to another part of Baltimore and made certain that I was not being followed. I then parked on the street for about ten minutes and noticed that there was no one around or near me that was interested in my presence. I then drove to the address on North Bond Street. . . . [T]here were two cars with Federal Bureau of Investigation agents waiting in the same block where I was keeping my appointment." Affidavit of defendant Maurice L. Braverman, copy on file in Yale Law Library.

"I used the phone in my room to call a summer resort in New York State to make reservations for myself. When I later arrived at the resort I was notified that about one hour after I called for reservations, the Federal Bureau of Investigation called the resort stating they knew I was coming to the resort and asking the resort management to keep the Federal Bureau of Investigation informed as to my arrival and departure." Affidavit of defendant Regina Frankfeld, copy on file in Yale Law Library.

Several similar episodes convinced defendants that they had been under a three-year period of wire tap surveillance. Affidavits of defendants Philip Frankfeld and Leroy H. Wood, copies on file in Yale Law Library.

18. Affidavit of defendant Maurice L. Braverman, copy on file in Yale Law Library.

19. Affidavit of Bernard J. Flynn, United States Attorney for the District of Maryland, copy on file in Yale Law Library.

20. United States v. Frankfeld, 100 F. Supp. 934, 937, 938 (D. Md. 1951).

21. *Id.* at 938.

22. Nardone v. United States, 308 U.S. 338, 342 (1939).

23. "The civilized conduct of criminal trials cannot be confined within mechanical rules. . . . Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." *Ibid.*

suggests that it refers to "tenuous claims" that particular evidence derives from wire tapping rather than to claims that wire tapping had occurred.[24] In any event, the evidence offered by the *Frankfeld* defendants seems more than merely "tenuous."

The district court's reliance on the government's promise not to use tainted evidence also seems unwarranted. If wires have been tapped, a hearing should be held regardless of government assurances.[25] Determination of whether particular evidence was obtained primarily from wire tapping or from independent sources is a delicate calculation which cannot properly be left to the government—a party in interest.[26] Moreover, the court ignored the government's strong implication—via a negative pregnant—that wires had in fact been tapped.[27]

The *Frankfeld* case reveals the weakness of the *Nardone* rule: it can operate only if the government is careless. And even if the *Frankfeld* defendants had been granted a hearing, most defendants would still be protected more in theory than in actuality since it would seldom be possible to amass as much evidence as was produced in the *Frankfeld* case. Nor would relaxation of the present ban against direct questioning of government witnesses help greatly. Prosecution witnesses will rarely know if wire tapping has been used in a particular instance. Arresting officers, for example, may not be told the sources of FBI information.[28] Similarly, the government prosecutor may

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24. *See* Nardone v. United States, 308 U.S. 338, 341-2 (1939).

25. In *Frankfeld* tapping of the defense attorney's telephone was also alleged. Since such action may in itself invalidate a conviction, Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952), the mere fact that the government did not intend to introduce evidence obtained from the taps should not have precluded inquiry about the taps.

26. *Cf. In re* Alemeida, 19 U.S.L. WEEK 2543 (E.D. Pa. May 15, 1951), where a convicted murderer was granted a writ of habeas corpus because of the failure of the District Attorney to produce evidence favorable to defendant. To the District Attorney's statement that the suppressed evidence was not material, the court answered: "But since when have we seen fit in this country to leave such questions to the whim, the caprice, the hatred or the favor of a prosecuting attorney?" *Ibid.*

27. Evasion of a direct answer to wire tap allegations is standard Justice Department practice. See, *e.g.,* United States v. Flynn, 103 F. Supp. 925 (S.D.N.Y. 1951), where defendants sought to prove wire tapping through the conclusions of a skilled technician who had attached sensitive testing equipment to their phones, and determined therefrom that taps were being made. In opposing the pre-trial motion, United States Attorney Myles J. Lane answered only that no evidence derived from wire tapping would be presented at the trial.

28. Thus FBI arresting agents in the *Coplon* prosecution, United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952), received only terse orders that told nothing beyond immediate operational plans. See affidavits of Richard T. Hradsky, John F. Malley, Roger W. Robinson, T. J. McAndrews, Sapplo Manno, Catherine T. Condon, Brewer Wilson, and others, Special Agents of the Federal Bureau of Investigation, photostatic copies on file in Yale Law Library.

receive only a list of FBI evidence which tells nothing of its origins.[29] Finding a witness who has direct knowledge of the wire tap would probably prove extremely difficult. In sum, *Nardone* gave victims of wire tapping an empty right; vigorous action by Congress or self-discipline in the Department of Justice are the only practical ways to halt official eavesdropping.

29. From records of the Coplon wire tap hearing it appears that prosecutors receive FBI investigative reports that apparently never refer to wire tapping as such. If the source of evidence is even mentioned, the term "confidential informant" is generally used. Transcript of Pre-Trial Record, p. 4061, United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952).